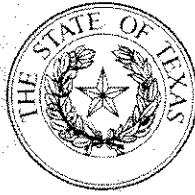


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 17, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-1944; TCEQ Docket No. 2009-1925-UCR; Appeal of Navarro County Wholesale Ratepayers to Review the Wholesale Rate Increase Imposed by the City of Corsicana, Certificate of Convenience and Necessity No. 10776, in Navrarro County

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 6, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than September 16, 2011.

The City of Corsicana filed a motion asking the ALJ to alter the above deadlines for filing exceptions and replies, so that neither would be due before September 21, 2011. The ALJ denied that motion because 30 TAC § 80.257(b) authorizes the Commission's General Counsel, not the ALJ, to change those deadlines. The General Counsel may wish to reconsider that request.

This matter has been designated **TCEQ Docket No. 2009; SOAH Docket No. 582-10-1944**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN:nl
Enclosures
cc: Mailing List

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STYLE/CASE: NAVARRO COUNTY WHOLESALE RATEPAYERS

SOAH DOCKET NUMBER: 582-10-1944

REFERRING AGENCY CASE: 2009-1925-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
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NAVARRO COUNTY WHOLESALE RATEPAYERS

SOAH DOCKET NO. 582-10-1944
TCEQ DOCKET NO. 2009-1925-UCR

APPEAL OF NAVARRO COUNTY WHOLESALE RATEPAYERS TO REVIEW THE WHOLESALE RATE INCREASE IMPOSED BY THE CITY OF CORSICANA, CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 10776, IN NAVARRO COUNTY	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**SOAH DOCKET NO. 582-10-1944
TCEQ DOCKET NO. 2009-1925-UCR**

APPEAL OF NAVARRO COUNTY WHOLESALE RATEPAYERS TO REVIEW THE WHOLESALE RATE INCREASE IMPOSED BY THE CITY OF CORSICANA, CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 10776, IN NAVARRO COUNTY	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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PROPOSAL FOR DECISION

I. INTRODUCTION

Navarro County Wholesale Ratepayers (NCWR) is a Texas non-profit corporation. NCWR and several wholesale water service customers (Ratepayers) of the City of Corsicana (Corsicana) have petitioned the Texas Commission on Environmental Quality (Commission or TCEQ) to review and reduce the rates that the Ratepayers pay Corsicana for wholesale water service. Corsicana and the Commission's Executive Director (ED) recommend that all of the petitions be denied.

The Administrative Law Judge (ALJ) recommends that the Commission deny all of the petitions. Because NCWR is not a ratepayer, the ALJ finds that it did not have jurisdictional standing to appeal Corsicana's rates. He further finds that the Ratepayers have failed to show that the protested rates adversely affect the public interest, which is a legally necessary requirement for further review of wholesale rates.

II. PARTIES

As discussed below, NCWR had no standing to bring this case and the ALJ recommends that its petitions be denied. NCWR was not admitted as a party in public-interest proceeding that the ALJ conducted. The following are the parties in public-interest proceeding:

PARTY	REPRESENTATIVE
M.E.N. Water Supply Corporation (M.E.N.); Rice Water Supply Corporation (Rice); Angus Water Supply Corporation (Angus); Chatfield Water Supply Corporation (Chatfield); Corbet Water Supply Corporation (Corbet); Navarro Mills Water Supply Corporation (Navarro Mills); City of Blooming Grove (Blooming Grove); City of Frost (Frost); City of Kerens (Kerens); and Community Water Company (Community) (collectively “Ratepayers”)	Paul M. Terrill, III and Schuyler Marshall
City of Corsicana (Corsicana)	J. Kay Trostle and Miguel Huerta
Executive Director (ED)	Ron Olson and Dinniah C. Tadema
Office of Public Interest Counsel (OPIC) ¹	Eli Martinez

III. PROCEDURAL HISTORY

Below is a list of the major procedural events in this case:

¹ Because OPIC did not take positions on the issues in this case, it is not referred to elsewhere in the PFD.

DATE	EVENT
March 31, 2010	First preliminary hearing
April 16, 2010	Deadline to amend pleadings
May 3, 2010	Deadline to file written arguments on jurisdictional issues
May 19, 2010	Deadline to file written responses to arguments on jurisdictional issues
May 28, 2010	Second preliminary hearing
May 28, 2010	Ratepayers' motion for interim rates was denied by the ALJ
May 28, 2010	Discovery Begins
November 5, 2010	Ratepayers to prefile their direct case in writing, including all testimony and exhibits
January 14, 2011	Corsicana prefiles its direct case in writing, including all testimony and exhibits.
February 18, 2011	ED prefiles his direct case in writing, including all testimony and exhibits
February 25, 2011	Deadline to file dispositive motions
March 4, 2011	Deadline to take depositions
March 4, 2011	Deadline to file objections to and motions to strike any prefiled evidence
March 9, 2011	Deadline to file responses to dispositive motions
March 11, 2011	Deadline to supplement discovery responses
March 22, 2011	Deadline to file responses to objections and motions to strike prefiled evidence
March 24, 2011	Prehearing conference
March 29, 2011	Hearing on the merits (HOM) of case begins
April 12, 2011	End of HOM
May 23, 2011	Deadline for filing initial closing arguments
June 27, 2011	Deadline for filing replies to closing arguments
August 26, 2011	Proposal for Decision (PFD) due date

IV. GENERAL DESCRIPTION OF CORSICANA'S RATES

Corsicana charges each of its customers a monthly base rate that is determined by the size of the customer's meter. The base rate ranges from \$17.60 for a 5/8- or 3/4-inch meter to \$1,695.52 for a 10-inch meter. The base rate includes the first 1,000 gallons used in the month, or the first 3,000 gallons for customers over 65 living in a single-family residence. Corsicana also charges tiered volumetric rates, also known as inclining-block rates, for gallons used in excess of the first 1,000 gallons. For Corsicana's wholesale customers and its inside city retail customers, the base and volumetric rates are the same. The volumetric rate is \$3.00 per 1,000 gallons for 1-10,000 gallons, \$3.15 per 1,000 gallons for 10,001-25,000 gallons, and \$3.25 per 1,000 gallons for over 25,000 gallons.²

V. JURISDICTION

No party questions that the Commission has some jurisdiction over the dispute in this case or that the State Office of Administrative Hearings (SOAH) has jurisdiction to preside over the prehearing and hearing and to prepare a PFD. However, the parties disagree as to the source and extent of the Commission's jurisdiction.

As discussed below, the ALJ admitted the Ratepayers are parties, but not NCWR.³ However, NCWR and all of the Ratepayers are represented by the same counsel. In their pleadings and briefs they usually refer to their clients collectively as NCWR.

Corsicana adopted the rates at issue on August 4, 2009, and the Ratepayers each received notice of that adoption a few days latter. On November 2, 2009, NCWR filed the Original

² Corsicana Ex. 1 at 15; NCWR Ex. 25 at NCWR 000250.

³ Order No. 6 at 3.

Petition⁴ in this case with the Commission and served it on Corsicana. The Original Petition did not name a single Ratepayer as a petitioner.

On December 1, 2009, a First Amended Petition⁵ was filed with the Commission and served on Corsicana. It named NCWR and some of the Ratepayers as petitioners. On April 16, 2010, a Second Amended Petition⁶ was filed and served on Corsicana. It named NCWR and all of the Ratepayers who are currently parties as petitioners.

The petitions asserted that the Commission had jurisdiction under statutes as set out below:

Petition	Jurisdictional Statutes
Original	Water Code §§ 11.041, 12.013 & 13.043
First Amended	Water Code §§ 11.041, 12.013 & 13.043(f)
Second Amended	Water Code §§ 11.036, 11.041, 12.013 & 13.043(f)

Water Code § 11.036 provides

(a) A person . . . having in possession and control any storm water, floodwater, or rainwater that is conserved or stored as authorized by [Water Code chapter 11] may contract to supply the water to any person . . . having the right to acquire use of the water.

(b) The price and terms of the contract shall be just and reasonable and without discrimination, and the contract is subject to the same revision and control as provided in this code for other water rates and charges. . . .

Water Code § 11.041(a) states:

⁴ ED Ex. A.

⁵ ED Ex. B.

⁶ ED Ex. D.

Any person entitled to receive or use water from any . . . conserved or stored supply may present to the commission a written petition showing:

- (1) that he is entitled to receive or use the water;
- (2) that he is willing and able to pay a just and reasonable price for the water;
- (3) that the party owning or controlling the water supply has water not contracted to others and available for the petitioner's use; and
- (4) that . . . the price or rental demanded for the available water is not reasonable and just or is discriminatory.

Under Water Code § 12.013:

- (a) The commission shall fix reasonable rates for the furnishing of . . . treated water for any purpose mentioned in Chapter 11 or 12 of this code.
- (b) The term "political subdivision" when used in this section means incorporated cities . . .
- (c) The commission in reviewing and fixing reasonable rates for furnishing water under this section may use any reasonable basis for fixing rates as may be determined by the commission to be appropriate under the circumstances of the case being reviewed; provided, however, the commission may not fix a rate which a political subdivision may charge for furnishing water which is less than the amount required to meet the debt service and bond coverage requirements of that political subdivision's outstanding debt.
- (d) The commission's jurisdiction under this section relating to incorporated cities . . . shall be limited to water furnished by such city, town, or village to another political subdivision on a wholesale basis. . . .

At the second preliminary hearing, sufficient evidence was offered to prove that the Commission has jurisdiction under Water Code §§ 11.036 and 11.041 to consider that Second Amended Petition by each of the Ratepayers. As to the Cities of Blooming Grove, Frost and Kerens (collectively Cities), the evidence also showed that the Commission has similar jurisdiction under Water Code § 12.013 to consider the Second Amended Petition because each of them is a political subdivision. None of those three jurisdictional statutes includes a deadline by which a petition for rate review must be filed.

The Commission's jurisdiction as described above to consider the Second Amended Petition under Water Code §§ 11.036, 11.041 and 12.013 is not disputed. The ALJ concludes

that the Commission has jurisdiction as described above to consider the Second Amended Petitions of the Ratepayers under those statutes.

However, NCWR and the Ratepayers continue to argue that the Commission also has jurisdiction under Water Code § 13.043(f). Corsicana disagrees, and the ED does not take a specific position. Section 13.043(f) states:

A retail public utility that receives water or sewer service from another retail public utility or political subdivision of the state, including an affected county, may appeal to the commission a decision of the provider of water or sewer service affecting the amount paid for water or sewer service. An appeal under this subsection must be initiated within 90 days after the date of notice of the decision is received from the provider of water or sewer service by the filing of a petition by the retail public utility.

At the first preliminary hearing, Corsicana appeared and objected to the Commission's jurisdiction. It argued that the NCWR had no standing to file the Original Petition; hence, that petition was inadequate to invoke the Commission's jurisdiction. Since the First Amended Petition was filed after the 90-day jurisdictional deadline, Corsicana claimed that it, too, was jurisdictionally inadequate. The Ratepayers and NCWR disagreed on both points.

While not definitely ruling on Corsicana's objections, the ALJ indicated at the first preliminary hearing that he was inclined to agree with Corsicana. Rather than dismiss the case as Corsicana requested, however, the ALJ set a schedule to allow the petition to be further amended to add other Ratepayers and to allow the submission of written arguments on jurisdictional issues. After the Second Amended Petition and jurisdictional arguments were filed, the ALJ convened the second preliminary hearing. As already stated, the Ratepayers were able to prove jurisdiction under other statutes. However, NCWR still could not prove that it had jurisdictional standing under any statute, and the Ratepayers still could not prove jurisdiction under Water Code § 13.043(f).

The Ratepayers contend that NCWR, as an association of the Ratepayers, was entitled to standing to file the Original Petition on their behalf and admission as a party. They claim that subsequent amendments, which named the Ratepayers, related back to the Original Petition and cured any defects in it. Because the Original Petition was timely filed within 90 days on behalf of the Ratepayers, they contend that it was sufficient to give the Commission jurisdiction under Water Code § 13.043(f). Corsicana does not agree with those arguments. Neither does the ALJ.

Water Code § 11.041(a) allows any person entitled to receive or use water to file a petition for rate review and Water Code § 12.013 allows a political subdivisions to file such a petition. NCWR does not receive water service from Corsicana and is not a political subdivision, so it had no jurisdictional standing to file a petition under either of those statutes.

Section 13.043(f) specifically requires a “retail public utility” to file a petition within 90 days after receiving notice of a rate change. NCWR filed the Original Petition within 90 days, but it is not a utility. Section 13.043(f) says nothing about an association filing a petition. Moreover, none of the Ratepayers was even named as a member of NCWR in the Original Petition, undermining their subsequent claim that it was filed on their behalf.

Further, as general principal of law associational standing is not appropriate when the participation of a party is required.⁷ As discussed in great detail later in the PFD, court decisions governing the Commission’s review of wholesale rates set pursuant to contract and the Commission’s rules governing that review⁸ require an initial determination that the protested rates adversely affects the public interest. If the rates do not, the petition to review the rates must be denied.⁹ Several of the factors that the Commission considers in determining whether the protested rate affects the public interest focus on the unique circumstances of an individual

⁷ *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).

⁸ 30 TAC Chapter 291, Subchapter I.

⁹ 30 TAC § 291.134(a).

ratepayer and its relationship with the wholesale provider.¹⁰ Under these circumstances, the ALJ concludes that the participation of the individual Ratepayers is required in a wholesale rate appeal, and NCWR did not have standing to file the Original Petition on behalf of the Ratepayers.

Because the Original Petition was not filed by any Ratepayer, the ALJ finds that it was not sufficient to invoke the Commission's jurisdiction under Water Code § 13.043(f). Since the First and Second Amended Petitions were not filed within 90 days after the Ratepayers received notice of the new rates, they also were not sufficient to invoke the Commission's jurisdiction under Water Code § 13.043(f). The ALJ concludes that the Commission has no jurisdiction under Water Code § 13.043(f) to review the disputed rates that Corsicana charges the Ratepayers.

VI. THE REQUIRED PUBLIC INTEREST DETERMINATION AND ITS SCOPE

A. The Requirement for an Initial Public-Interest Determination

This PFD addresses whether the rates that Corsicana charges the Ratepayers adversely affect the public interest. It does not address whether the protested rates are based on Corsicana's cost of service. That is in accord with the Commission's wholesale-service rules. A remand hearing will be held to determine Corsicana's cost of service only if the Commission first concludes that the public interest is adversely affected by the rates.

The Commission's wholesale-service rules—Subchapter I of Chapter 291 of 30 TAC—are applicable to “a petition to review rates charged for the sale of water for resale filed pursuant to Texas Water Code, Chapter 11 or 12; or . . . an appeal pursuant to Texas Water Code, §13.043(f).”¹¹ Because the Commission's jurisdiction to consider the Ratepayers petition is

¹⁰ 30 TAC § 291.133(a)(2), (3)(A) & (D) & (4).

¹¹ 30 TAC § 291.128.

derived from Water Code §§ 11.036, 11.041 and 12.013, the wholesale-service rules apply to this case.

Unless the parties agree otherwise,¹² and in this case they have not, the wholesale-service rules require an initial hearing to determine whether a protested rate charged pursuant to a contract adversely affects the public interest. 30 TAC § 291.131(b) states:

(b) For a petition or appeal to review a rate that is charged pursuant to a written contract, the executive director will forward the petition or appeal to [SOAH] to conduct an evidentiary hearing on public interest.

Further, 30 TAC § 291.132(a) & (c) state:

(a) If the executive director forwards a petition to [SOAH] pursuant to §291.131(a) and (b) of this title . . . [SOAH] shall conduct an evidentiary hearing on public interest to determine whether the protested rate adversely affects the public interest.

(c) The administrative law judge shall prepare a proposal for decision and order with proposed findings of fact and conclusions of law concerning whether the protested rate adversely affects the public interest, and shall submit this recommendation to the commission.

In the public-interest hearing, the petitioner has burden of proof.¹³ If the Commission determines the protested rate does not adversely affect the public interest, the Commission will deny the petition or appeal by final order.¹⁴ If the Commission determines that the protested rate adversely affects the public interest, the Commission will remand the matter to [SOAH] for further evidentiary proceedings on the rate.¹⁵

¹² 30 TAC § 291.132(d).

¹³ 30 TAC § 291.136.

¹⁴ 30 TAC § 291.134(a).

¹⁵ 30 TAC § 291.134(b).

These public-interest hearing rules were adopted in 1994 following the Texas 3rd Court of Appeals' decision in *Texas Water Commission v. City of Fort Worth*.¹⁶ The Texas Constitution limits the state's ability to pass laws that impair contractual obligations to instances where the public safety and welfare must be protected.¹⁷ In *City of Fort Worth*, the Court held that Water Code § 13.043(f) did not violate the constitutional ban on the impairment of contracts; however, the Court found that the appropriate scope of appellate review under that section required that the Commission first make a finding that the rates affected by a "decision of the provider" adversely affected the public interest by being unreasonably preferential, prejudicial, or discriminatory.¹⁸ In so holding, the 3rd Court noted its similar holding in a case involving a Texas regulatory agency's review of the contract price for the sale of natural gas to a wholesale customer.¹⁹ It also cited the United States Supreme Court's similar holding in a case involving a federal agency's setting rates for wholesale electric power when the seller and customer already had a contract that set the price.²⁰

In *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority*, the 13th Court of Appeals found that the TCEQ's public-interest rules were a proper exercise of the Commission's statutory authority and found no reason to disturb the rate-reviewing scheme instituted by the Commission.²¹ The Court specifically rejected arguments that requiring wholesale-contract ratepayers to first show that the protested rate adversely affects the public interest is contrary to Water Code §§ 11.036(b) and 12.013, which require the Commission to ensure that rates are just and reasonable.

¹⁶ *Texas Water Commission v. City of Fort Worth*, 875 S.W.2d 332 (Tex. App. – Austin 1994).

¹⁷ TEX. CONST. art. I, § 16.

¹⁸ 875 S.W.2d 332, 336.

¹⁹ *High Plains Natural Gas Co. v. Railroad Commission*, 467 S.W.2d 532, 534 & 537 (Tex. Civ.App.—Austin 1971, writ ref'd n.r.e.)

²⁰ *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 at 355, 76 S.Ct. 368 at 372, 100 L.Ed. 388 (1955).

²¹ *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority*, 286 S.W.2d 397, 405-406 (Tex. App. – Corpus Christi-Edinburg 2008). This case was transferred from the 3rd Court of Appeals to the 13th Court of Appeals under a docket equalization order issued by the Supreme Court of Texas.

B. Public-Interest Considerations in This Case

Commission rule 30 TAC § 291.133(a) sets out the factors to be considered in determining whether the public interest is affected by a protested wholesale rate. However, the Ratepayers have not claimed that the factors set out in 30 TAC § 291.133(a)(1), (2) & (4) are applicable in this case. For that reason, the ALJ granted Corsicana's motion for partial summary disposition, on March 14, 2011, and found the following:

- The Ratepayers have not claimed and there is no evidence that the protested rates impair Corsicana's ability to continue to provide service, based on Corsicana's financial integrity and operational capability.
- The Ratepayers have not claimed and there is no evidence that the protested rates impair their ability to continue to provide service to their retail customers, based on their financial integrity and operational capability.
- The Ratepayers have not claimed and there is no evidence that the protested rates are unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates Corsicana charges other wholesale customers.

That leaves on the table only those factors set out in 30 TAC § 291.133(a)(3), which states:

The commission shall determine the protested rate adversely affects the public interest if after the evidentiary hearing on public interest the commission concludes at least one of the following public interest criteria have been violated:

...

(3) the protested rate evidences the seller's abuse of monopoly power in its provision of water . . . service to the purchaser. In making this inquiry, the commission shall weigh all relevant factors. The factors may include:

(A) the disparate bargaining power of the parties, including the purchaser's alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water . . . service;

(B) the seller's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates;

(C) the seller changed the computation of the revenue requirement or rate from one methodology to another;

(D) where the seller demands the protested rate pursuant to a contract, other valuable consideration received by a party incident to the contract;

(E) incentives necessary to encourage regional projects or water conservation measures;

(F) the seller's obligation to meet federal and state . . . drinking water standards;

(G) the rates charged in Texas by other sellers of water . . . service for resale;

(H) the seller's rates for water . . . service charged to its retail customers, compared to the retail rates the purchaser charges its retail customers as a result of the wholesale rate the seller demands from the purchaser . . .

C. The Public-Interest Inquiry is Limited to the Factors Set Out in the Commission's Rule

The Ratepayers argue that the inquiry into whether Corsicana's rates affect the public interest should be broad. They especially argue that it should include consideration of whether the rates have a disparate impact on them as wholesale customers when compared to the impact on Corsicana's retail customers. Corsicana disagrees with that argument.

The ALJ concludes that the public-interest inquiry is limited to the factors set out in 30 TAC § 291.133(a)(1)-(4). It does not include a comparison of protested rate's impacts on wholesale and retail customers.

It is true that the word "disparate" appears in 30 TAC § 291.133(a)(3)(A). It is used when indicating that the "disparate bargaining power of the parties" might indicate the protested wholesale rate is affected by the public interest. The Ratepayers claim that their bargaining power is disparate from and less than Corsicana's. That argument is considered later in the PFD. But *disparate bargaining power* between wholesale buyers and sellers is not synonymous with a

disparate rate impact on the wholesale and retail customers. The Ratepayers disparate impact argument is not relevant under 30 TAC § 291.133(a)(3)(A).

Also, the word “discriminatory” appears in 30 TAC § 291.133(a)(4). It provides that a protested rate would be affected by the public interest if it “is unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates the seller charges other wholesale customers.” However, there is no evidence that Corsicana charges different rates to different wholesale customers, and the Ratepayers do not claim that Corsicana discriminates between wholesale customers. Instead, the Ratepayers contend that the impact of the rates on them as wholesale customer is discriminatory compared to the impact on *retail* customers. That argument is not relevant under 30 TAC § 291.133(a)(4).

Another monopolistic-abuse factor is worth mention here. It specifies that a water seller’s rates for its own retail customers should be compared to the retail rates that the seller’s customer charges its retail customers as a result of the rates paid for the wholesale water.²² That factor is considered later in the PFD. But it is important to note that it focuses on the wholesale rate’s impact to ultimate retail customers, not the impact on intermediate wholesale customers, such as the Ratepayers who are parties in this case.

Beyond the specific public-interest factors listed in 30 TAC § 291.133(a), the Ratepayers point to language in the preamble when the Commission adopted the rule. The Commission stated, “The public interest inquiry under paragraph § 291.133(a)(3) should sufficiently cover whether any disparity in treatment between retail and wholesale customers adversely affects the public interest.”²³ According to the Ratepayers, that statement clarifies that “abuse of monopoly power” is simply a way of characterizing discrimination between customer groups and relevant factors demonstrating a disparity in treatment between retail and wholesale customers weigh in

²² 30 TAC § 291.133(a)(3)(H).

²³ 9 Tex. Reg. 6229 (1994) (courtesy copy at NCWR Ex. 58).

favor of a finding abuse of monopoly power. Corsicana, the ED, and the ALJ do not agree with that interpretation.

The preamble language was in response to comments submitted concerning the proposed version of 30 TAC § 291.133 (a)(4). As proposed it indicated that the public interest would be violated if “the protested rate appears to discriminate between the purchaser and others who purchase water or sewer service from the seller, and the seller does not provide reasonable support for such discrimination.”²⁴ The Commission agreed with the commentator that the proposed Section 291.133(a)(4) should be changed to its current form, which focuses only on discrimination between wholesale customers. Thus, the Commission specifically chose to narrow the public-interest inquiry and not look into alleged discrimination favoring retail over wholesale customers.

Given that context, when the Commission said in the preamble that Section 291.133(a)(3) should sufficiently cover whether any disparity in treatment between retail and wholesale customers adversely affects the public interest, it was saying that rule limited the inquiry, not that it was expandable. Eliminating any doubt on that point, the Commission at another place in the preamble rejected a commenter’s argument that the public-interest inquiry should not be limited to the criteria listed in Section 291.133(a)(1)-(4). The Commission said, “The public interest criteria as adopted are sufficiently broad. A party should not be allowed to urge that some other criteria have been violated.”²⁵

²⁴ 19 Tex. Reg. 3899 et seq. (May 20, 1994).

< <http://texinfo.library.unt.edu/texasregister/text/1994/0520prop.txt> >

²⁵ 19 Tex. Reg. 6228 (Column 3).

D. Cost of Service Is Not Relevant To Determining Whether Rates Affect The Public Interest

Throughout the case, the Ratepayers have claimed that the protested rates are not based on Corsicana's cost of service. However, 30 TAC § 291.133(b) states: "The commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service." Relatedly, 30 TAC § 291.132(b) provides, "Prior to the evidentiary hearing on public interest, discovery shall be limited to matters relevant to the evidentiary hearing on public interest."

While acknowledging the existence of those rules, the Ratepayers have argued throughout the case that cost-of-service information is nevertheless discoverable and must be considered in this public-interest phase of the case. They support that argument by citing Water Code §§ 11.036(b) and 11.041(a)(4), which prohibit discrimination in wholesale contracts and rates, and Water Code § 12.013, which requires reasonable wholesale rates for political subdivisions. They also cite the language of 30 TAC § 291.133(a)(3), which sets out specific factors and also states that "all relevant factors" may be considered in determining whether the protested rates evidence the seller's abuse of monopoly power. The Ratepayers contend that Corsicana's rates exceed the reasonable cost of serving them and evidence Corsicana's abuse of monopoly power.

To show that Corsicana intended to discriminate against them, the Ratepayers point to a statement by Corsicana Mayor Buster Brown to two wholesale customer representatives when they asked why Corsicana had adopted an inclining-block rate structure. The Mayor responded, "Well, because you don't vote."²⁶

The other Parties respond, and the ALJ agrees, that the Ratepayer cost-of-service arguments are legally irrelevant. Rules 291.133(b) specifically, clearly, and unambiguously

²⁶ NCWR Ex. J (Ivey) at 18 & Ex. A (Metcalf) at 21.

renders Corsicana's cost of service legally irrelevant to determining whether the public interest will be adversely affected by Corsicana's rates. Texas law requires the TCEQ—and every other state agency—to follow its own rules until those rules are changed.²⁷ Additionally, the ALJ would err if he failed to apply the TCEQ's rules when preparing a PFD.²⁸

Moreover, an agency's interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the clear, unambiguous language of its rules.²⁹ When it adopted its wholesale-service rules, the Commission explained them in detail in its preamble.³⁰ The Commission chose to end a policy that had nearly automatically cancelled rates set by contract and substituted rates based on cost of service.³¹ It instituted the public-interest review process to give deference to the contractual agreements between the purchaser and seller. In doing so, the Commission sought to balance the parties' constitutional right to contract with the Commission's statutory authority to review wholesale rates.³² The Commission favored a conservative approach when evaluating evidence regarding the public-interest criteria to determine whether to cancel a rate that was set pursuant to a contract.³³ The Commission stated its legal conclusion that the public interest does not demand that a wholesale rate equal the seller's cost of service.³⁴ That is why the Commission decided that it would not consider the seller's cost of services in the public-interest hearing.³⁵

²⁷ Water Code § 5.103(c) states: "The commission shall follow its own rules as adopted until it changes them in accordance with [the APA]." If a Texas agency fails to follow the clear, unambiguous language of its own regulations, its action is arbitrary and capricious. See *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999) and *Public Util. Comm'n v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

²⁸ TEX. GOV'T CODE ANN. (Gov't Code) § 2001.058(b) and (e)(1).

²⁹ *Public Util. Comm'n of Tex. v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex.1991); *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-255 (Tex.1999).

³⁰ 19 Tex. Reg. 6227-32 (1994).

³¹ 19 Tex. Reg. 6229.

³² 19 Tex. Reg. 6227.

³³ 19 Tex. Reg. 6228.

³⁴ 19 Tex. Reg. 6228-6229.

³⁵ 19 Tex. Reg. 6228.

It is true, as the Ratepayers note, that the Commission rejected exact and mathematical tests to determine abuse of monopoly power. However, that does not mean that the Commission somehow left open the possibility that abuse of monopoly power might be shown through cost-of-service arguments. To the contrary, the Commission stated in the preamble that it was rejecting exact and mathematical tests because they often required cost-of-service analyses,³⁶ which the Commission chose to exclude from consideration in determining whether a protested rate adversely affects the public interest.³⁷

Based on the above, the ALJ concludes that evidence concerning Corsicana's cost of service is irrelevant to determining whether Corsicana's rates adversely affect the public interest.

E. Cost-of-Service Arguments Are Not Relevant Even If Support by Evidence

Despite its irrelevancy, the Ratepayers requested discovery concerning Corsicana's cost of service. They also offered evidence purporting to show that the rates that they are required to pay Corsicana are not based on Corsicana's cost of serving them. Citing 30 TAC §§ 291.132(b) and 291.133(b), Corsicana generally objected to those discovery requests and evidence. Similarly, though less often, the Ratepayers objected to some of the evidence that Corsicana offered because it concerned cost of service.

In response to the objections, the Ratepayers argued that their discovery requests and proffered evidence, even if they concerned cost of service, were also relevant to other public-interest factors set out in 30 TAC § 291.133(a)(3). To a more limited extent, Corsicana made that same argument about evidence it offered. When presented with those arguments, the ALJ attempted to discern whether the material in question might reasonably relate to a non-cost-of-

³⁶ 19 Tex. Reg. 6229 (Column 1).

³⁷ 30 TAC § 291.133(b).

service public-interest factor set out in that rule. If he concluded that it did, the ALJ overruled the objection.

The line between evidence that concerned only cost of service and that which concerned another relevant factor was not always clear. When the line was blurry, the ALJ tended to admit the evidence. In response to evidence that their opponents had offered, the Parties sometimes sought to cross-examine witnesses or offer evidence that arguably concerned Corsicana's cost of service. To avoid hearing only one side of the story, the ALJ generally overruled objections if the question or evidence was even marginally responsive to the prior evidence offered by the opponent. Additionally, if no objection was raised, the ALJ rarely interposed his own cost-of-service objection.

Given all of the above, a fair amount of the evidence in the record at least marginally concerns Corsicana's cost of service. Citing that evidence, the Ratepayers offer the following arguments to claim that Corsicana's rates will adversely affect the public interest:

- A claim that a report³⁸ prepared for Corsicana by Robert McLain concerning the city's water and wastewater rates and other drafts of that report³⁹ show that the water rates protested in this case are not based on Corsicana cost of serving the Ratepayers;⁴⁰
- A contention that the protested rates are 40% above the cost of providing water to the Ratepayers, according to Corsicana's rate consultant;⁴¹
- A criticism of Corsicana for not calling Mr. McLain as a witness to explain and defend the rate study that he prepared;⁴²

³⁸ NCWR Ex. 24.

³⁹ NCWR Exs. 59 & 69.

⁴⁰ Ratepayers Initial Brief at 13-23.

⁴¹ Ratepayers Initial Brief at 20 & 37.

⁴² Ratepayers Initial Brief at 17.

- Allegations that Corsicana improperly failed to implement cost-based rates as preferred by the American Water Works Association (AWWA) and that the protested rates include inclining-block gallonage rates that are not based on costs;⁴³
- A claim that Corsicana adopted the protested water rates to shift a shortfall in its wastewater service revenue to its out-of-city wholesale water customers, the vast majority of which are the Ratepayers;⁴⁴
- An allegation that their water rates were set overly high to subsidize both residential retail water and wastewater services;
- A claim that a shortfall in Corsicana's Utility Fund, which is discussed later in the PFD, was primarily due to Corsicana's rates for its *wastewater* utility service, which they do not purchase, being set too low to cover the expenses of that service;
- A criticism of certain revenue allocations assumed in the study that Mr. McLain prepared;⁴⁵
- An allegation that Corsicana unreasonably set its water-service rates based in part on anticipated future increases in certain water service expenses, some of which did not subsequently occur;⁴⁶
- A claim that Corsicana incurred certain expenses too long before the rates were changed to justify the increase;⁴⁷
- A criticism of a witness that Corsicana did call, Allen M. Mullins, because he was not familiar with Corsicana's load factors and cost allocations and other information regarding the demand on the system and because Mr. Mullins did not confer with Mr. McLain about the study Mr. McLain prepared;⁴⁸ and
- A complaint that rates Mr. McLain suggests as possibilities in future years are not based on cost of service,⁴⁹ even though Corsicana has not adopted those rates and they are not at issue in this case.

⁴³ Ratepayers Initial Brief at 18, 19, 20, 30, 31, 43, 44 & 45.

⁴⁴ Ratepayers Initial Brief at 4, 14, 23, 39 & 40.

⁴⁵ Ratepayers Initial Brief at 15-16.

⁴⁶ Ratepayers' Initial Brief at 37-42 & Reply Brief at 30-33.

⁴⁷ Ratepayers' Initial Brief at 37-42 & Reply Brief at 30-33.

⁴⁸ Ratepayers Initial Brief at 48.

⁴⁹ Ratepayers Initial Brief at 20, 21 & 22.

Similarly, Corsicana makes several cost-of-service arguments. While arguing that the details of its cost of service are irrelevant, Corsicana attempted to show that the total of its expenses to provide water service was higher than its water service revenues at the time of the rate increase. It also claimed that it had already cut its expenses as much as possible and that it reasonably anticipated increases in water-service expenses in the near future.⁵⁰ The ED addresses those same points and generally agrees with Corsicana as to them.⁵¹

All of these are cost-of-service and closely related arguments. The ALJ sees no need to examine those arguments or the evidence that the Ratepayers cite to support them. Because 30 TAC § 291.133(b) provides that the Commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service, these arguments by the Ratepayers are legally irrelevant.⁵²

Rules 30 TAC § 291.129(3) & (4) generally define “cost of service” for wholesale cases, based on whether the Cash or Utility Basis is being used. However, those rules do not provide detailed standards for determining cost of service. Words and phrases used in rules are construed according to the technical or particular meaning that they have acquired, whether by legislative definition or otherwise and must be read in context.⁵³

Within the immediate context of the wholesale-service rules is 30 TAC § 291.135(a), which provides that in wholesale cases the Commission shall follow the mandates of the Water Code, Chapters 11, 12, and 13, to calculate the annual cost of service. That suggests that all water-rate regulation should follow similar methods for determining cost of service. Within the larger context of water-rate regulation is 30 TAC § 291.31, which regulates cost-of-service

⁵⁰ Corsicana’s Initial Brief at 22-24 & Reply Brief at 20-29.

⁵¹ ED’s Initial Brief at 11-15 & Reply Brief at 6-10.

⁵² Additionally, these irrelevant arguments largely rely on the McLain study (NCWR Ex. 24) and earlier drafts of it to which the ALJ assigns no evidentiary weight.

⁵³ TEX. Gov’t. CODE ANN. (Gov’t Code) §§ 311.002(4) & 311.011.

determinations in detail for retail and other types of water rate cases. The ALJ concludes the 30 TAC § 291.31 should also be applied to determine the cost of wholesale water service since the larger context indicates that “cost of service” has the technical meaning set out in that section.

When judged under the detailed meaning of “cost of service” set out in 30 TAC § 291.31, many of the arguments put forth by Corsicana and the Ratepayers are clearly cost of service arguments. They directly or indirectly concern whether certain operation and maintenance expenses were used, useful, necessary, and reasonable to provide water service.⁵⁴ For example, Corsicana’s claim that its expenses were exceeding its costs clearly raises questions about whether those expenses were necessary and reasonable. Along those lines the Ratepayers want to argue that the rates they pay are actually covering a portion of Corsicana’s cost of providing *wastewater* service; hence, not necessary and reasonable to provide *water* service. Similarly, arguments over whether an expense was incurred too long before or after Corsicana changed its rates anticipate disputes over whether the expense was incurred during the test year and, if it occurred after, whether it was known and measureable when the rates were set.⁵⁵

Granted, the ALJ admitted the cost-of-service evidence that the Parties cite to support their changed-conditions arguments. Moreover, during discovery and the hearing, the ALJ indicated that he thought changes in cost of service could be changes in conditions that might demonstrate a basis for a change in rates.⁵⁶ On further review, however, the ALJ has concluded that he was wrong on that point. For purposes of determining whether the protested rates adversely affect the public interest, the Commission has placed cost-of-service evidence completely off the table. Based on that, the ALJ concludes that all cost-of-service evidence is irrelevant in the public-interest hearing.

⁵⁴ See 30 TAC § 291.31(b)(1)(A) & (B) & (2)(I) & (c)(2)(A).

⁵⁵ See 30 TAC § 291.31(b).

⁵⁶ E.g. Order No. 12.

F. Whether Protested Rates Conform To Contracts Is Outside the Scope of This Case

M.E.N.,⁵⁷ Angus,⁵⁸ Chatfield,⁵⁹ Corbet,⁶⁰ Frost,⁶¹ Community,⁶² and Rice⁶³ have separately entered into a standard contract (Standard Contract) with Corsicana, though each contract is slightly different. The Standard Contract provides “if, during the term of this contract, Seller revises its minimum inside city retail water rate, then such revised rate shall likewise apply to water usage by Purchaser under this Contract.”⁶⁴ Ms. Standridge testified that the wholesale customers’ contracts require that the wholesale rate be the same as the rate charged to retail customers residing inside Corsicana, and that methodology continues to be honored by Corsicana with the 2009 Rate Ordinance.⁶⁵

The Ratepayers disagree with Ms. Standridge. They claim that Corsicana is misinterpreting the Standard Contract. They also claim that Corsicana’s failure to adhere to the contract must be considered because it is relevant to show Corsicana’s abuse of monopolistic power. Both the ED and Corsicana argue that interpreting the water supply contracts between the Parties and determining whether the protested rates comply with those contracts is outside the scope of this case.

⁵⁷ NCWR Ex. 1

⁵⁸ NCWR Ex. 3.

⁵⁹ NCWR Ex. 5.

⁶⁰ NCWR Ex. 7.

⁶¹ NCWR Ex. 11.

⁶² NCWR Ex. 14 (Purdon), 16 (Retreat), and 17 (Beaton Lake).

⁶³ NCWR Ex. 22.

⁶⁴ Standard Contracts, last sentence of Sec. 4.03(a).

⁶⁵ Corsicana Ex. 1 at 6.

The ALJ concludes that whether the protested rate conforms to the contracts between the Ratepayers and Corsicana is outside the scope of this case. In adopting the Wholesale-service rules the Commission stated that at least one rule:

assumes the seller's "protested rate" correctly interprets any existing agreement between the seller and purchaser. There will be instances where the purchaser files a petition or appeal and the commission finds the protested rate does not adversely affect the public interest. The commission decision is not tantamount to a judicial interpretation of any underlying agreement. The parties would still have the courts to seek this redress."⁶⁶

Additionally, the Commission indicated in at least one contested case that it assumed that the protested rate correctly interpreted the existing contract with the wholesale customers.⁶⁷

VII. MCLAIN STUDY AND DRAFTS SHOULD HAVE NO EVIDENTIARY WEIGHT

As noted above, the Ratepayers mostly base their legally irrelevant cost-of-service arguments on a rate study prepared for Corsicana by Mr. McLain⁶⁸ and his earlier drafts.⁶⁹ Additionally, both the Ratepayers and Corsicana cite the Mr. McLain study and drafts to support their positions on other public-interest issues that are relevant. For example, Corsicana cites it to support its contention that it changed its rates based on changed conditions.⁷⁰

Mr. McLain did not testify, so there was no opportunity to evaluate his credibility, his expertise to offer the opinions stated in his study and drafts, the bases for his opinions, or the sources of information for the facts stated in the studies and drafts. Moreover, Ratepayers' rate

⁶⁶ NCWR Ex. 58 (19 TexReg 6227 (middle column)).

⁶⁷ *Order Denying Petition of City of Arlington Appealing Wastewater Rates Calculated by the City of Fort Worth; Applications Nos. 8748-A and 9261-A; Docket No. 94-0685-UCR; COL 7.*

⁶⁸ NCWR Ex. 24.

⁶⁹ NCWR Exs. 59 & 69; Corsicana Ex. 32.

⁷⁰ Corsicana Reply Brief at 24-25.

expert, Jack Stowe, testified that the McLain study was contaminated by mathematical errors and was not reliable.⁷¹ Given all of that, the ALJ assigns no evidentiary weight to the McLain study and drafts.

VIII. ABUSE OF MONOPOLY POWER

The Ratepayers claim that Corsicana is a monopoly provider of water service to them. Corsicana argues that the Ratepayers have alternatives to purchasing treated water from it. Even if it has monopoly power in providing water to them, Corsicana argues that it has not abused that power.

The ALJ concludes that Corsicana has not abused its monopoly power, if it exists, to provide water service to the Ratepayers.

A. Disparate Bargaining Power of the Parties

1. Ratepayers' Alternative Means of Obtaining Water

The Ratepayers claim that they have no alternative to obtaining water from Corsicana. The ED agrees. Corsicana disagrees.

The ALJ finds that the Ratepayers have few or no alternatives to Corsicana for obtaining water.

⁷¹ Tr. 1247-48.

a. Alternative Sources Generally

The 2011 Region C Water Plan could only recommend a few water management strategies for most of the Ratepayers.⁷² For Frost, only conservation was listed. Velma Ballew, Mayor of Frost, testified that her city had two wells but one was plugged due to poor water quality and the other produced too little water to meet the city's needs.⁷³ For Chatfield, Community, Kerens, and M.E.N., the only options listed in the Water Plan were conservation and purchasing additional supply from Corsicana.

Angus and Corbet are not mentioned in the 2011 Region C Water Plan. However, their representatives testified that they knew of no alternative to Corsicana available to Angus or Corbet for obtaining water.⁷⁴ There is no evidence to contradict that testimony.

Rice is already obtaining water from another source, the City of Ennis (Ennis), and the plan indicated that Rice could obtain additional water from Ennis.⁷⁵ But Rice's General Manager, Joey Smith, testified that Ennis did not have an adequate supply to meet Rice's needs.⁷⁶ The Water Plan indicated that Blooming Grove and Navarro Mills could also use groundwater. However, Blooming Grove's Assistant City Superintendent, Chris Ivy, who oversees the city's water service, testified that Blooming Grove had to plug a well due to quality and quantity issues.⁷⁷ Navarro Mills' office manager, Danny Gordon, testified that there was no guarantee that groundwater of sufficient quality could be obtained even if an adequate quantity were available.⁷⁸

⁷² NCWR Ex. 27 at NCWR 000256-257; Corsicana Ex. 31.

⁷³ NCWR Ex. C at 8 & 14.

⁷⁴ NCWR Ex. D at 13 & Ex. E at 12.

⁷⁵ NCWR Ex. 27 at NCWR 000257.

⁷⁶ *NCWR Ex. I at 14:3-8 (Smith Prefiled)*.

⁷⁷ *NCWR Ex. J at 12:19-13:18 (Ivey Prefiled)*.

⁷⁸ *NCWR Ex. H at 12:4-21 (Gordon Prefiled)*.

Even if there was another source from which they could obtain water, the Ratepayers could face large practical, legal, and other obstacles to obtaining water from another source. Witnesses for several Ratepayers generally testified that the cost of pipelines, regulatory uncertainty due to the need to amend the regional water plan, and environmental disturbance due to construction of infrastructure would make it difficult and expensive to obtain water from another source even if one could be found.⁷⁹ More specifically, most of the Ratepayers have contracts with Corsicana that require them to pay Corsicana for at least a minimum amount of water even if they obtain water from another source.⁸⁰ Several Ratepayers testified that these provisions, which they refer to as “penalties,” would make it very expensive for them to switch to another supplier even if they could find one.⁸¹

Corsicana is in the business of selling raw water⁸² and has raw water rights that could be available for purchase by the wholesale customers.⁸³ Corsicana’s City Manager, Connie Standridge, suggested that Corsicana could supply raw water to the Ratepayers as an alternative to purchasing treated water from Corsicana. She later admitted, however, that Corsicana had never brought that up before this proceeding.⁸⁴ Ms. Standridge also stated that she did not consider raw water from Corsicana to be another source for the Ratepayers.⁸⁵

Corsicana argues that Ms. Standridge meant that she would not consider raw water from Corsicana to be “another source” as that term is used in Section 4.03(d) of the Standard Contract; suggesting that obtaining raw instead of treated water from Corsicana would not trigger the

⁷⁹ *E.g.* NCWR Ex. A at 15-16.

⁸⁰ *E.g.* NCWR Ex. 1 at NCWR 000005.

⁸¹ NCWR Ex. A at 15-16; NCWR Ex. F at 13-14; NCWR Ex. D at 13-14; NCWR Ex. G at 13-14; NCWR Ex. B at 17-18; NCWR Ex. C at 14.

⁸² Tr. 643:6 – 8; and 783:4 – 20 (Standridge).

⁸³ Corsicana Ex. 1 at 13:21-23.

⁸⁴ Tr. 715.

⁸⁵ Tr. 719-720.

contract's take or pay provision. Corsicana argues that Ms. Standridge did not mean to say that raw water was not an alternative means of obtaining water. Ms. Standridge did not make that distinction in her testimony, and the ALJ cannot draw such a distinction based on her brief testimony on the subject. Moreover, it is illogical to argue that the alternative to a supplier of a commodity is that same supplier because it can furnish another commodity.

The ALJ concludes that the Ratepayers generally have few alternatives to Corsicana for obtaining water.

b. Efforts to Obtain Water from TRWD

The Ratepayers claim that Corsicana abused its monopoly power by using its influence to prevent some of them from obtaining water from their only viable alternative source, Tarrant Regional Water District (TRWD).

In response, Corsicana notes that the witnesses asserting that Corsicana interfered with an attempt to obtain water from TRWD rely on letters rather than their personal knowledge. Corsicana claims that when all of the letters are examined they demonstrate an entirely different series of actions, which prove that Corsicana did not wield the power to force TRWD to refuse requests to purchase water. Instead, according to Corsicana, TRWD and Trinity River Authority (TRA) decided, based on their own policies, not to sell water to the Ratepayers. The ED agrees with Corsicana.

The ALJ concludes that obtaining water from TRWD instead of Corsicana is not an alternative available to the Ratepayers. He does not find, however, that Corsicana had or attempted to exercise power over TRWD to deprive the Ratepayers of an alternative water supply. Instead, the evidence shows that for reasons of its own, TRWD chose not to supply water to the Ratepayers who had requested it. Accordingly, the ALJ does not find that the

Ratepayers' failure to obtain water from TRWD indicates that Corsicana abused monopoly power over the Ratepayers.

From 1999-2001, Rice, M.E.N., and Chatfield attempted to purchase raw water from TRWD.⁸⁶ Rice went so far as to plan locations for a booster station and a tap⁸⁷ and submit detailed plans, maps, timeline, and cost estimates for infrastructure construction to TRWD.⁸⁸ Rice also received engineering plans from TRWD,⁸⁹ purchased land for a treatment plant,⁹⁰ applied for USDA funding,⁹¹ and began working with TRWD on drafts of a contract.⁹²

Several letters are in evidence concerning subsequent events. The first⁹³ was written on December 2, 1999, by Ms. Standridge, in her capacity as Corsicana's City Engineer and in response to a request from TRWD's Steve Christian.⁹⁴ Ms. Standridge testified that Corsicana's letters were in response to TRWD's inquiry as to whether Corsicana's long range planning included Rice's water supply needs, and whether Corsicana had expended significant investments to meet those needs.⁹⁵ In the December 2, 1999 letter, Corsicana confirmed that it had made extensive improvements at significant costs to improve the northern portion of its distribution system that serves Rice, that it had supplied water to Rice for 25 years and would like to continue to do so, and that Corsicana had an adequate supply of treated water available to serve Rice and its other customers throughout Navarro County.

⁸⁶ NCWR Ex. 44.

⁸⁷ NCWR Ex. 37; NCWR Ex. 38.

⁸⁸ NCWR Ex. 39; NCWR Ex. 49; NCWR Ex. 52.

⁸⁹ NCWR Ex. 43.

⁹⁰ NCWR Ex. 40.

⁹¹ NCWR Ex. 41; NCWR Ex. 42.

⁹² NCWR Ex. 39.

⁹³ NCWR Ex. 45.

⁹⁴ Tr. 813: 19 – 814:13.

⁹⁵ Corsicana Ex. 1 at 14; Tr. 813-814 (Connie Standridge).

The second letter was written on December 21, 1999, by Corsicana City Manager Truitt Gilbreath to James Fortson at Rice.⁹⁶ It explained Corsicana's investment and planning efforts to ensure that it could meet the future water needs of Rice, as well as other water supply districts and Corsicana itself. The letter also included an analysis performed by Corsicana's Environmental Services Director, Larry Murray, concerning Rice's interest in building a water treatment plant to treat raw water Rice hoped to purchase from TRWD.⁹⁷ Mr. Murray analyzed the two options that Rice was considering: (1) building a 3.0 MGD plant and purchasing water from TRWD, or (2) installing a 12-inch line parallel to the existing 10-inch line from Corsicana and continuing to purchase water from Corsicana. He concluded that the cost of a new water treatment plant would be \$3.72 per 1,000 gallons whereas the cost to install a new line and continue to buy water from Corsicana would be \$2.09 per 1,000 gallons. City Manager Gilbreath advised Mr. Fortson of the significant savings Rice would achieve by following the second option and reiterated Corsicana's interest in keeping Rice as a wholesale treated water customer.

The third letter⁹⁸ was from Mr. Gilbreath to Mr. Christian and was dated February 28, 2000. It advised TRWD of a meeting between Rice and Corsicana held earlier that month. This letter also explained that regulatory requirements (at that time, those of the Texas Natural Resource Conservation Commission) required Corsicana to have adequate production facilities to serve all customers under contract. At the time, Rice's customers equaled 11.5% of the total customer base of the City, which translated into a proportional share of Corsicana's investment in capacity of \$1.25 million (while revenues received from Rice represented only 6%). The letter concluded with Corsicana's reaffirmation of its desire to continue providing service to Rice.

⁹⁶ NCWR Ex. 46.

⁹⁷ Corsicana Ex. 21.

⁹⁸ NCWR Ex. 47.

Corsicana claims that the next letter presents the most compelling evidence of why TRA and TRWD made the decision to refuse Rice's request to purchase water. It is dated November 17, 2000, and is from TRA to Kenneth Petersen, who was acting as Rice's attorney.⁹⁹ TRA advised Rice that TRA has been unsuccessful in securing a supply of water for Rice. TRA explained that in 1989, Ennis, along with 14 other entities in Ellis County, conducted a regional water study for that county. That resulted in TRA entering into long term contracts with TRWD in 1991 and 1993 for the purchase of 16.391 MGD of raw water for 13 contracting parties. Ennis was the only Ellis County entity that did not enter into contract with TRA at that time. Then in 2000, Ennis requested TRA to determine if Ennis could obtain 9.8 MGD of raw water through the Ellis County Regional Water Supply Project. Ennis wanted the water to serve Ennis' service area through 2050, the Tractebel power plant with raw water for cooling, and possibly providing Rice WSC with treated water. TRA then submitted a formal request to TRWD for 9.8 MGD for the benefit of Ennis. TRA and TRWD met to discuss the Ennis proposal and the TRWD staff submitted its position on the Ennis request to the TRWD Board of Directors.

The November 17, 2000, letter indicated that since the Ellis County Plan had been implemented, TRWD's position had changed in several ways that were detrimental to Ennis' and hence Rice's request. First, TRWD was less willing to sell water from its pipelines because those sales had a negative impact on the cost and availability of raw water for TRWD's parties in Tarrant County. Second, TRWD was not willing to enter into contracts to sell raw water for power plant cooling purposes because the peak for cooling coincided with the peak demand for municipal use of water, and the impact on electrical costs could be significant. Third, TRWD viewed municipal water suppliers with long-term raw or treated water supply contracts in place as having less need, and TRWD would not give favorable consideration to their buying water from TRWD's raw-water pipelines. Given all this, TRWD was not willing to consider a contract with TRA for water that Ennis would resell to Tractebel or Rice, *unless* either or both desired to

⁹⁹ NCWR Ex. 51.

construct a pipeline to a TRWD reservoir. TRA did not consider that alternative as justified due to the long length and the cost of a pipeline.

Nevertheless, according to TRA, TRWD was willing to sell 3.56 MGD of water to Ennis, which was the quantity identified in the 1989 Ellis County report, but under different terms — including a take-or-pay provision (based on 100% of the amount of water contractually identified and at an initial rate of \$0.66 per 1,000 gallons that would be adjusted each year) and a buy-in premium that was at that time \$227,769 per MGD (total \$811,000 to Ennis), payable when the contract was approved. Ennis would also have to pay in monthly installments of one-twelfth the estimated annual obligation. The contract would also contain a ratchet provision, requiring that once a minimum volume was effected it would never be lowered. TRA was attempting to work out the details of contracts between TRA and TRWD and between TRA and Ennis.

Finally, with respect to Rice's request, TRA advised Mr. Petersen that TRA had "no available water rights in Ellis County and the TRWD has not expressed a willingness to provide water from their pipelines for Rice's benefit." TRA invited Mr. Petersen to discuss the request with TRWD's staff.

The final letter in this series is dated February 13, 2001.¹⁰⁰ It is from TRWD to the engineer for Rice, Chatfield and M.E.N. It reiterated TRWD's position as stated earlier in the letter from TRA. TRWD stated:

[TRWD] is committed under contract to supplement the existing water supply of . . . Corsicana and supply its long-term water demands from the Richland-Chambers Reservoir. It is [TRWD's] understanding that all water needs for Chatfield, M.E.N., and Rice are currently being met under contracts with . . . Corsicana, and that Corsicana's long range plan includes meeting the needs of these customers beyond 2050. [TRWD's] goal is to ensure that long-term water needs in its service area are met, either directly or indirectly. . . . [TRWD's] role is to provide for future water demands that are unmet by existing sources, not

¹⁰⁰ NCWR Ex. 50.

become an alternative to them. . . . it would be inappropriate for [TRWD] to enter into a contract to meet a perceived demand that is addressed in another District contract.”¹⁰¹

Even if Corsicana only intended to protect itself, the Ratepayers argue that Corsicana clearly had far more influence on TRWD than Rice. They claim that Corsicana used its disparate bargaining power to cause problems and prevent Rice from obtaining alternative water service. According to the Ratepayers, this was an abuse of Corsicana’s monopoly power.

According to Corsicana, the Ratepayers’ theory of interference by Corsicana in Rice’s attempted dealings with TRWD cannot reasonably be reconciled with the above letters. Corsicana maintains that it had no way to influence TRWD’s decisions whether to sell water, to whom to sell, or what quantity to sell.¹⁰² Corsicana does not control either TRWD or the TRA.¹⁰³ Corsicana is not affiliated with TRWD in any way, and Corsicana does not have a representative on TRWD’s Board.¹⁰⁴ Corsicana holds water rights in the Richland Chambers and Navarro Mills Reservoirs. The latter is managed by TRA. Corsicana does not buy water from either TRA or TRWD.¹⁰⁵

Based on the above, the ALJ finds that TRWD is not a source of water that is available to the Ratepayers as an alternative to Corsicana. The lack of that alternative means that Corsicana has greater power when bargaining with the Ratepayers.

However, the ALJ does not find that TRWD’s choice ten years ago to not supply water to Rice, M.E.N., and Chatfield indicates that Corsicana was abusing its disparate bargaining power. The evidence does not show that Corsicana had any power or undue influence over TRWD.

¹⁰¹ NCWR Ex. 50.

¹⁰² Tr. 814.

¹⁰³ Corsicana Ex. 1 at 14: 1 – 16.

¹⁰⁴ Tr. 814.

¹⁰⁵ Tr. 714.

Instead, it shows that for reasons of its own TRWD chose not to supply water to Rice, M.E.N., and Chatfield. Selling water from TRWD's pipelines would have had negative cost and availability impacts on TRWD's existing customers in Tarrant County. TRWD acknowledged those impacts on existing customers could have been avoided but only through means that would have been cost prohibitive to Rice and the others. Additionally, because Corsicana was already supplying water to Chatfield, M.E.N., and Rice, TRWD saw no need to become involved. TRWD saw its mission as supplying yet unmet needs instead of becoming an alternative supplier for existing purchases.

c. Existing Contracts Do Not Show Monopoly Abuse

The Ratepayers argue that their existing contracts with Corsicana, and especially the Standard Contract that many of them have signed, effectively give Corsicana a monopoly and demonstrate that Corsicana has abused that monopoly. Corsicana denies that it has a monopoly, but even if it has one, it denies that the contracts indicate that it has abused its monopoly. The ED agrees with the Ratepayers that the existing contracts essentially give Corsicana a monopoly, but he agrees with Corsicana that it has not abused its monopoly power.

The ALJ does not find that the water supply contracts between Corsicana and the Ratepayers show that Corsicana has abused monopoly power, assuming that it has that power.

The Ratepayers argue that Corsicana has abused its monopoly power by developing and implementing the Standard Contract, which contains sole source and penalty provisions to ensure that no Ratepayer would obtain alternative sources of water.¹⁰⁶ Since 2001, Corsicana has entered into the Standard Contract (with some modifications) with M.E.N.,¹⁰⁷ Angus,¹⁰⁸

¹⁰⁶ See, e.g., NCWR Ex. 22 at Section 4.03(d).

¹⁰⁷ NCWR Ex. 1

¹⁰⁸ NCWR Ex. 3.

Chatfield,¹⁰⁹ Corbet,¹¹⁰ Frost,¹¹¹ Community,¹¹² and Rice.¹¹³ The Ratepayers claim that, except for M.E.N., those Ratepayers have been required to sign the Standard Contract and had no choice in the matter.¹¹⁴ They also argue that the Standard Contract puts Corsicana in a monopoly position to impose the abusive rates at issue in this case because it contains abusive terms that lock in Corsicana as their sole provider.

Corsicana denies that the Standard Contract indicates abuse. It contends that portions of the Standard Contract were initially negotiated between representatives of Corsicana and the Ratepayers. As with any negotiated contract, some terms are more favorable to the Ratepayers while others are favorable to Corsicana.¹¹⁵ Additionally, Corsicana claims that the Standard Contract has been altered to address the particular needs of each wholesale customer.

The Standard Contract was prepared in mid-2001, and was intended for use by Corsicana when a wholesale customer requested to amend its contract.¹¹⁶ The Standard Contract was created as a joint effort of Kenneth Petersen, Jr., General Counsel for the Texas Rural Water Association, and Ron Freeman, Corsicana's water rights attorney.¹¹⁷ During the prior year and a half Mr. Petersen had also acted as an attorney for Rice.¹¹⁸ Additionally, according to Mr. Stowe, Corsicana's customers are member of the Texas Rural Water Association.¹¹⁹

¹⁰⁹ NCWR Ex. 5.

¹¹⁰ NCWR Ex. 7.

¹¹¹ NCWR Ex. 11.

¹¹² NCWR Ex. 14 (Purdon), 16 (Retreat), and 17 (Beaton Lake).

¹¹³ NCWR Ex. 22.

¹¹⁴ NCWR Ex. D at 13:12-15, 15:2-11 (Weinkauff Prefiled); NCWR Ex. C at 13:18-20, 15:3-5, 15:18-16:9 (Ballew Prefiled); NCWR Ex. B at 16:21-17:4, 19:2-4, 20:1-17 (Donoho Prefiled).

¹¹⁵ Tr. at 791:19-23 (Standridge, April 1, 2011).

¹¹⁶ Corsicana Ex. 24.

¹¹⁷ Corsicana Ex. 24 at 1.

¹¹⁸ NCWR Ex. 47 (February 28, 2000 letter from City Manager Gilbreath to TRWD, referring to Mr. Petersen as "representing Rice WSC."); NCWR Ex. 42 (April 14, 2000 letter from Mr. Petersen as Attorney for

Corsicana maintains that Mr. Petersen's participation in the creation of the Standard Contract is important because it evidences that the wholesale customers had an attorney actively engaged in representing their interests in creating the Standard Contract. The Ratepayers dispute that, noting that Mr. Petersen only represented Rice and arguing that the other Ratepayers were unrepresented. The ALJ finds that it is reasonable to infer that in his dual role as attorney for one of the Ratepayers and General Counsel for the Texas Rural Water Association, which includes Corsicana's customers, Mr. Petersen's input would have been in the general interest of Corsicana's wholesale customers.

At a June 26, 2001 meeting, Mr. Petersen and Mr. Freeman presented the proposed Standard Contract to representatives of several of Corsicana wholesale water customers.¹²⁰ All of Corsicana's wholesale water customers were notified of and invited to that meeting.¹²¹ Among the attendants were M.E.N.'s General Manager, Dennis Donoho, and President, Paul Mitchell. Jerry Jackson, a developer identified by Mr. Donoho as wanting to develop subdivisions within M.E.N.'s service area, was also at the meeting.¹²² Jack Stowe, who is an expert witness for the Ratepayers in the current case, was also present.¹²³ Mr. Donoho acknowledged that there was an opportunity for the wholesale customers at that meeting to provide input into the Standard Contract.¹²⁴

Rice, to USDA, Rural Development); and NCWR Ex. 51 (November 17, 2000, TRA letter to Mr. Petersen in response to Mr. Petersen's October 18th inquiry on behalf of his client Rice WSC.)

¹¹⁹ Tr. 574.

¹²⁰ Corsicana Ex. 24 at 1; Tr. 574:19 – 23.

¹²¹ Corsicana Ex. 22 at 1.

¹²² Tr. 426-429; Corsicana Ex. 22 at 3-4.

¹²³ Corsicana Ex. 22 at 3; Tr. 573:5 – 25.

¹²⁴ Tr. 429: 9 – 10.

Given Mr. Petersen's participation in and agreement to the initial drafting and an open meeting to which all of Corsicana's wholesale customers were invited and which some attended and provided input, the ALJ does not find as a general proposition that the Standard Contract was unilaterally imposed by Corsicana on its customers. Instead, he generally concludes that it was a negotiated contract intended to balance the interests of the Corsicana and its wholesale customers.

The Ratepayers also argue that their earlier contracts with Corsicana were largely unique. They claim the mere fact that the Standard Contracts are identical conclusively demonstrates that no negotiations actually took place and they were forced to agree to the Standard Contract because Corsicana gave them no choice. Corsicana does not agree and also claims that the original contracts were also very similar to each other.

The ALJ does not agree that the mere use of a Standard Contract form for similar customers is evidence of abuse or coercion. That is especially so when, as discussed above, the evidence shows that the Standard Contract was developed with an opportunity for input from all wholesale customers and through negotiations between Corsicana's representatives and Mr. Petersen, who represented one of the Ratepayers and was at least loosely looking out for the interests of other wholesale customers. Moreover, each Standard Contract was altered to include the term and amount of water sought by each Ratepayer.

Nevertheless, the Ratepayers particularly focus on and object to Section 4.03(d) of the Standard Contract, which they refer to as the "sole source" and "penalty" provision.¹²⁵ Using Chatfield's contract as an example,¹²⁶ that section states:

¹²⁵ This provision is found in all seven of the Standard Contracts finalized since 2001. Section 4.03(d) in M.E.N.'s contract, NCWR Ex. 1, differs slightly in its language, but the Ratepayers argue that the effect of that provision is substantially the same as the Standard Contract.

¹²⁶ NCWR Ex. 5 at NCWR 000034.

4.03. Rate Revision * * * d. Except during emergencies when Seller is unable to meet all of Purchaser's water supply needs, Purchaser agrees to use as its sole source of water supply only water purchased from Seller under this Contract to meet all of the needs of Purchaser's customers. If in any calendar year during this Contract Purchaser obtains water from another source other than for said emergency purposes, then Purchaser shall in any event pay Seller during said calendar year for a minimum amount of water equal to the greater of the amount of water actually delivered by Seller to Purchaser during each monthly billing cycle during said year or 5,000,000 gallons per monthly billing cycle during said year. (Minimum bill was calculated at approximately fifty percent (50%) of the past three (3) years average usage).

The Ratepayers claim that if one of them tried to obtain its water elsewhere, Section 4.03(d) would impose a stiff penalty of 50% of its annual average billings based on the previous three years usage, for the remainder of the contract term. Since the contracts have terms of several decades,¹²⁷ the Ratepayers argue that these penalties could amount to millions of dollars, even for a Ratepayer who purchases small quantities of water.¹²⁸

First, Corsicana responds that the wholesale contracts of Blooming Grove, Kerens and Navarro Mills contain no provision like Section 4.03(d).¹²⁹ Accordingly, Corsicana contends that the Ratepayers' arguments based on Section 4.03(d) do not indicate any disparate bargaining power or monopoly abuse as to those three Ratepayers. The ALJ agrees with Corsicana on that point.

Second, Corsicana claims that Section 4.03(d) is not actually a "sole source" provision.¹³⁰ The phrase "sole source" appears in the first sentence, but Corsicana contends that the plain reading of the entire Section 4.03(d) shows that the contract expressly contemplates that the purchaser may obtain water from other sources while paying for and taking a minimum amount

¹²⁷ See, e.g., NCWR Ex. 1 at Section 7.01; NCWR Ex. 3 at Section 7.01; NCWR Ex. 5 at Section 7.01; NCWR Ex. 18 at 2; NCWR Ex. 22 at Section 7.01.

¹²⁸ See, e.g. NCWR Ex. E at 12:11-15 (Gatewood Prefiled).

¹²⁹ Corsicana Ex. 1 at Ex. CAS-3.

¹³⁰ Corsicana Ex. 1 at 9:1 – 14 and 13:6-7.

of water from Corsicana.¹³¹ Mr. Mullins, who has extensive experience with water utility rates and management, characterized Section 4.03(d) as “kind of odd.” He testified that sole source provisions generally say that the seller is the sole source for all of the buyer’s water purchases unless the parties later agree otherwise. He characterized Section 4.03(d) as acknowledging that the seller would not necessarily be the sole source and obligating the buyer either to take or pay for a specified minimum amount of water.¹³² Rice’s ongoing purchases from Ennis, after entering into the Standard Contract with Corsicana in 2002, demonstrate that Section 4.03(d) is not a sole source provision.¹³³

Third, Corsicana claims that Section 4.03(d) is not a penalty provision, despite the Ratepayers characterizing it as one.¹³⁴ Corsicana maintains it is an alternative minimum payment provision that only applies if the Purchaser obtains non-emergency water from another source and reasonably balances the risks of that alternative purchase between the parties to the contract. The ALJ agrees with that characterization.

For example, Chatfield’s contract obligates Corsicana to provide up to 60 million gallons per month (MGM) of water to Chatfield.¹³⁵ Chatfield’s average consumption is slightly over 11 MGM.¹³⁶ If Chatfield reduced its purchase to 5 MGM, Section 4.03(d) would obligate it to pay Corsicana only for the water actually delivered. Chatfield would be free to obtain the rest of its water from any other source. Thus, Chatfield is free to reduce its current average monthly purchase from Corsicana by over 50%. That gives Chatfield wide latitude to purchase water

¹³¹ *Corsicana* Ex. 1 at 9:2-14.

¹³² Tr. 1147:13 – 11:48:6 (Mullins).

¹³³ Tr. 1148:10 – 25, and *Corsicana* Ex. 1 (Standridge) at Exhibit CAS-5 (Ennis’ Record of Sales to Rice from July 2005 through October 2008).

¹³⁴ NCWR Ex. C (Ballew) at 12 – 13; NCWR Ex. B (Donoho) at 16 – 17; NCWR Ex. E (Gatewood) at 12; NCWR Ex. F (Hampel) at 13; NCWR Ex. A (Metcalf) at 14 – 15; NCWR Ex. I (Smith) at 13; NCWR Ex. D (Weinkauf) at 12. Mr. Stowe repeats his clients’ mischaracterization of this provision as a penalty in his prefiled testimony at NCWR Ex. Contract at 18.

¹³⁵ NCWR Ex. 5 at NCWR 000031.

¹³⁶ NCWR Ex. A at 10.

from another supplier if it can find one. Only if Chatfield purchased less than 5 MGM from Corsicana while also obtaining non-emergency water from another source would it owe Corsicana for anything other than the water purchased.¹³⁷

On the other hand, Corsicana would remain contractually obligated to make available to Chatfield the full 60 MGM through the end of its contract.¹³⁸ Unless TCEQ approves a waiver, a TCEQ rules requires Corsicana to maintain the capacity to meet the maximum daily commitment in all of its wholesale contracts.¹³⁹ For Chatfield, the commitment is 2 million gallons per day (MGD), which generally equates to 60 MGM. According to Corsicana, Section 4.03(d) shifts a small part of the risk of performance under the Contract to the wholesale customer, while continuing to place the burden on Corsicana to treat and make available to its wholesale customers many more millions of gallons than the wholesale customers report that they buy on average.¹⁴⁰

Corsicana characterizes Section 4.03(d) as a small step moving the wholesale customers towards sharing a small part of the cost of Corsicana's obligation to provide the large volumes of treated water required by the contracts, while at the same time, not placing a minimum take provision on the wholesale customers.¹⁴¹ To be able to make plans and obligate resources to ensure it meets this regulatory duty, Corsicana added this provision to its Standard Contract to ensure funding from its sale of water doesn't disappear entirely.¹⁴² If a wholesale customer opted to use the alternative minimum payment provision in the contract, Corsicana would still be obligated to provide treatment capacity reserves to meet the number of connections required in the wholesale contract until that contract expired. If any of the wholesale customers with

¹³⁷ Paying *for* water you consume cannot reasonably be characterized as a penalty.

¹³⁸ Corsicana Ex. 1 at 10: 5 – 18.

¹³⁹ 30 TEX. ADMIN. CODE § 290.45(e)(1).

¹⁴⁰ Corsicana Ex. 29.

¹⁴¹ Corsicana Ex. 1 (Standridge) at 9:25 – 30; and Tr. 1150:13-1151:2 (Mullins).

¹⁴² Corsicana Ex. 1 at 9:25-28.

contracts containing Section 4.03(d) obtain non-emergency water from another source in sufficient quantities to make this section applicable, it provides very little protection to Corsicana.¹⁴³

The ALJ concludes that Section 4.03(d) partially limits the Ratepayers' access to alternative suppliers but is not abusive. As discussed below, the Ratepayers have steadily increased their demands for water, and Corsicana has agreed to supply those demands. Corsicana persuasively argues that Section 4.03(d) is a reasonable provision to limit Corsicana's risk that the investment it must make to serve the Ratepayers will be rendered worthless should the ratepayers switch to another supplier. It was not abusive for Corsicana to insist on Section 4.03(b), which kept its risk within reasonable bounds.

The Ratepayers also argue that the Standard Contract evidences Corsicana abuse of them because the volumetric rates that they are charged under their contracts have changed over time from declining-block, to flat, to inclining-block. This Ratepayer argument is intertwined with and cannot be separated from other Ratepayer objections to Corsicana's inclining-block gallonage rates. Those include the Ratepayers' contentions that Corsicana's adoption of inclining-block rates disparately and negatively impacts them and their retail customers, was a change its rate methodology to their detriment, and does not encourage water conservation by them. The ALJ considers and rejects all of those arguments at other points in the PFD.

Even if the Standard Contract includes some terms that are favorable to them, the Ratepayers claim that it is much less favorable than previous contracts. They also argue that their contracts with Corsicana have becomes progressively less favorable to them. Ms. Standridge and Mr. Mullins agreed that Section 4.03(b) is more favorable to Corsicana and less favorable to the Ratepayers, than the previous contracts.¹⁴⁴ But Corsicana does not agree

¹⁴³ Tr. 1151:10-24 (Mullins).

¹⁴⁴ Tr. 748, 750 & 1047.

that the Standard Contract is largely less favorable to the Ratepayers than the earlier contracts or that the contracts have grown steadily less favorable to the Ratepayers.

Attachment A to Corsicana's Initial Post-Hearing Brief is a table that accurately summarizes key facts concerning the past and present wholesale contracts between Corsicana and the Ratepayers. It also includes citations to the evidence. Rather than repeat that 20-page summary at length here, the ALJ would refer the Commissioners to that attachment, which supports Corsicana's arguments immediately below. Corsicana argues without refute that:

- Every wholesale contract that Corsicana has entered into with each of its wholesale customers since the 1960s has authorized Corsicana to set and change the rates. While the language has changed somewhat over time, the substance has not.
- Section 4.03(c) of the Standard Contract gives the Ratepayers the right to appeal Corsicana's rates under applicable law, but every contract since the original has contained a provision making it subject to all valid rules, regulations, and laws, which would include legal provisions allowing an appeal to the Commission.
- Corsicana's ability to change its rates is limited under the Standard Contract to no more frequently than annually,¹⁴⁵ which is a much more favorable provision for the wholesale customers than earlier contracts.¹⁴⁶
- The wholesale customers repeatedly returned to the Corsicana for more water, and Corsicana agreed to provide it. Even in the middle of this dispute, Angus sought more water, and Corsicana agreed to a contract amendment to provide more water.¹⁴⁷
- Many of the original contracts required each wholesale customer to furnish and install its meter, which Corsicana would then maintain.¹⁴⁸ The Standard Contract

¹⁴⁵ See, definition of "Rate Schedule" and Section 4.03(a) of the Standard Contracts.

¹⁴⁶ See, e.g., NCWR Ex. 2 at NCWR 000013-14 (change allowed on 10 days notice and no limit on frequency of change); NCWR Ex. 20 at NCWR 000141 (changed allowed on 10 days notice and no limit on frequency of change); NCWR Ex. 4 at NCWR 000028 (change allowed every 60 days); NCWR Ex. 19 at NCWR 000136 (change allowed every 90 days).

¹⁴⁷ Corsicana Ex. 12.

¹⁴⁸ See, e.g., NCWR Ex. 2 at NCWR 000012 (4. Measuring Equipment).

changed that by imposing a connection/meter fee for new connections, and removing the cost of the meter from rate base.¹⁴⁹ Hence, this change was essentially neutral.

- The acceptable accuracy level for meters was 2 percent above or below normal in the original and Standard Contracts.¹⁵⁰ However, the adjustment period if metering equipment was in excess of the 2 percent level increased from 90 days under the original contracts to 6 months under the Standard Contracts. This provision in the Standard Contract allows either party a longer period of time to recover erroneous charges so it benefits them equally.
- Standard Contract Section 4.05 extends the time for payment to 25 days after issuance of the bill, which contrasts with the original contracts which gave the wholesale customer only 10 days to pay.¹⁵¹ This change in the Standard Contract favors the wholesale customers.

Some Ratepayers suggest that the capacity commitments and long terms in their contracts were imposed upon them by Corsicana, which evidences Corsicana's disparate bargaining power and abuse of monopoly power.¹⁵² However, their premise is unsupported by any persuasive evidence.

Each contract indicates that the capacity commitments were determined by the wholesale customer.¹⁵³ Additionally, Corsicana's Ms. Standridge testified that the number of gallons of water per month (or per day) is determined by and included in the contracts at the request of each of the contracting wholesale customers.¹⁵⁴

¹⁴⁹ Standard Contract Section 4.04.

¹⁵⁰ Compare NCWR Ex. 2 at NCWR 000012 to NCWR Ex. 1 at Section 3.01 and 3.03.

¹⁵¹ *See, e.g.*, NCWR Ex. 2 at NCWR 000013.

¹⁵² NCWR Ex. 1 at 19 (Smith for Rice as to excess term); Tr. 94 and 131 (Metcalf for Chatfield as to excess capacity); Tr. 225:11–23 (Weinkauff for Corbet as to excess capacity).

¹⁵³ *See* Corsicana's Initial Brief at Attachment A for citations to evidence.

¹⁵⁴ Corsicana Ex. 1 at 10:20- 11:2.

The Ratepayers argue that Corsicana sent Corbet a contract for more water than it had requested, suggesting that Corsicana coerced Corbet into a greater commitment than it wanted. This is based on the testimony of David Weinkauff,¹⁵⁵ who is now the General Manager of Corbet.¹⁵⁶ Though the current contract is for 30 MGM, Mr. Weinkauff testified that Corbett had only asked Corsicana to raise its maximum amount from 10 MGM to 18.5 MGM.

Mr. Weinkauff only began to work for Corbet on May 1, 2007,¹⁵⁷ so he was not involved in the negotiations leading to the 2003 contract. Mr. Weinkauff testified that he had reviewed minutes of a meeting of Corbet's board when it discussed seeking an increase to 18.5 MGM.¹⁵⁸ However, Corbet's 1967 contract, the one in place until 2003 contract, was already for a supply of 18.5 MGM.¹⁵⁹ Corbet's current contract was entered into on October 21, 2003. It recites, "Purchaser has requested that the Prior Contract be amended to purchase additional water from Seller."¹⁶⁰ When confronted with this discrepancy, Mr. Weinkauff admitted that he was confused.¹⁶¹

Mr. Weinkauff's testimony that Corbet only sought 18.5 MGM in 2003 is inconsistent with the fact that Corbet was already entitled to receive that amount. For that reason, the ALJ attaches no weight to Mr. Weinkauff's testimony that Corsicana sent Corbet a contract for more water than it requested. The ALJ concludes that Corbet's Standard Contract, like those of the other Ratepayers, was for the capacity amount that Corbet sought.

¹⁵⁵ Tr. 221-222.

¹⁵⁶ NCWR Ex. D at 1.

¹⁵⁷ Tr. 223.

¹⁵⁸ Tr. 221-222.

¹⁵⁹ Corsicana Ex. 10 at 5.

¹⁶⁰ NCWR Ex. 7 at 1 & 2.

¹⁶¹ Tr. 223.

Similarly, the term of each of the wholesale contracts is based on the wholesale customers' specific requests.¹⁶² Except for Community's, each wholesale contract since the beginning has had a term of more than 20 years. Long terms enabled some Ratepayers to obtain financing for their systems, for example from Farmers Home Administration¹⁶³ and USDA Rural Development.¹⁶⁴ Since most of Corsicana's debt is 20-year term, Ms. Standridge testified that any contractual term beyond that is solely for the benefit of the customer.¹⁶⁵

The ALJ does not conclude that the differences between the prior contracts and the Standard Contract demonstrate Corsicana's abuse of monopoly power. Many of the changes in the Standard Contract are either beneficial to the Ratepayers or equally beneficial to them and Corsicana. While Section 4.03(d) is beneficial to Corsicana, the ALJ concludes that it is reasonable and not abusive.

2. Alternative Costs

Rule 30 TAC § 291.133(a)(3)(A) provides that in determining whether the parties have disparate bargaining power the purchaser's alternative costs should be considered. To the extent that the Ratepayers have alternatives, there is no evidence that the cost of those alternatives would be lower than buying water from Corsicana.

Rice's water supply contract with Ennis entitles Rice to purchase 2.7 MGM of water.¹⁶⁶ Rice currently pays Ennis \$3.00 per 1,000 gallons¹⁶⁷ with a \$6,750 monthly minimum

¹⁶² See Corsicana's Initial Brief at Attachment A for citations to evidence.

¹⁶³ See, NCWR Ex. 2 at NCWR 000014-15.

¹⁶⁴ Corsicana Ex. 1 at 11:6 - 12:4.

¹⁶⁵ Corsicana Ex. 1 at 11-12 & CAS-4

¹⁶⁶ Tr. 327.

¹⁶⁷ Tr. 324-325.

payment.¹⁶⁸ If Rice bought the maximum volume under the Ennis contract, it would pay an effective rate of \$5.50 per 1,000 gallons.¹⁶⁹ That is substantially higher than Rice's effective rate with Corsicana of \$3.389 per 1,000 gallons.¹⁷⁰

The only other significant evidence about alternative costs concerns the amount that Rice, M.E.N., and Chatfield would have paid if TRWD had been willing to sell them water. As indicated above, Corsicana's Mr. Murray calculated in December 1999 that purchasing water from TRWD would have cost Rice, M.E.N. and Chatfield \$3.72 per 1,000 gallons, while purchasing additional water from Corsicana would have cost them \$2.09 per 1,000 gallons.¹⁷¹ There was no contradictory evidence on that point.

Corsicana adopted its current disputed rates in 2009, approximately ten years after Mr. Murray prepared his comparison of TRWD's and Corsicana's rates. Based on their average monthly consumption and taking into account all current rates, Rice pays Corsicana an average of \$3.389 per 1,000 gallons,¹⁷² M.E.N. pays \$3.296,¹⁷³ and Chatfield pays \$3.33.¹⁷⁴ Those amounts are still significantly less than the \$3.72 per 1,000 gallons that they would have paid TRWD.

The ALJ concludes that a comparison of what the Ratepayers pay Corsicana under the protested rates and what the Ratepayers pay or would have paid alternative suppliers does not indicate that Corsicana has abused its disparately greater bargaining power over the Ratepayers.

¹⁶⁸ Tr. 326-327.

¹⁶⁹ $\$6,750 + (2,700 \text{ TG} @ \$3.00/\text{TG} = \$8100) = \$14,850/2,700 = \$5.50/\text{TG}$. Tr. 327 – 329.

¹⁷⁰ Corsicana Ex. 23.

¹⁷¹ NCWR Ex. 46 and Corsicana Ex. 21.

¹⁷² Corsicana Ex. 23.

¹⁷³ Corsicana Ex. 8.

¹⁷⁴ Corsicana Ex. 5.

3. Other Disparate Bargaining Power Factors

There is no significant evidence concerning the other disparate-bargaining-power factors listed in 30 TAC § 291.133(a)(3)(A), environmental impact and regulatory issues.

4. Disparate Bargaining Power Conclusions

The ALJ finds that Corsicana has disparate bargaining power over the Ratepayers due to their lack of alternative sources of obtaining water service. However, the evidence comparing what the Ratepayers pay Corsicana under the protested rates and what the Ratepayers pay or would have paid alternative suppliers does not indicate that Corsicana has abused its disparately greater bargaining power over the Ratepayers.

Whether its disparately greater bargaining power makes Corsicana a monopoly is a different question. Determining whether a monopoly exists is fundamentally an economic question. Corsicana's witness Mr. Mullins testified that in classical economic theory a monopoly exists when there is a barrier to another supplier entering the market and supplying a service. He questioned whether Corsicana was a monopoly in that sense.¹⁷⁵ The ALJ would as well.

Rice currently purchases water from Ennis,¹⁷⁶ so there was no barrier to Ennis entering the market to provide water to Rice. From the evidence discussed above, it would seem that there was no barrier to TRWD supplying water to Rice, M.E.N., and Chatfield. TRWD simply chose not to. Additionally, Section 4.03(d) of the Standard Contract does not prohibit the Ratepayers' from buying water from another supplier if they can find one, though it would obligate them to pay Corsicana a minimum amount to limit harm to Corsicana.

¹⁷⁵ Tr. 1037-38.

¹⁷⁶ Corsicana Ex. 1 at CAS-5.

The ALJ is troubled by the lack of expert testimony from an economist on the issue of monopoly, which is fundamentally an economic issue. Mr. Mullins agreed that the contracts between Corsicana and each of the Ratepayers meant that Corsicana was effectively operating as a monopoly.¹⁷⁷ The Ratepayers' witness, Mr. Stowe, and the ED's witness, Mr. Dickey, agreed that Corsicana was operating as a monopoly.¹⁷⁸ Of those three, only Mr. Stowe concluded that Corsicana had abused its monopoly. Mr. Stowe and Mr. Mullins have degrees in accounting and deep expertise in a wide variety of water-utility issues.¹⁷⁹ Mr. Dickey was trained in mechanical engineering and has deep experience in water-utility regulatory issues.¹⁸⁰ They clearly are familiar with economic issues and have related expertise, but none of the three is an economist.

Ultimately, the ALJ sees no need for the Commission to determine in this case if Corsicana is a monopoly. That is because, as discussed elsewhere in the PFD, the ALJ concludes that Corsicana has not abused monopoly power, even assuming that it has that power. In a future case, whether Corsicana has a monopoly might be a more critical issue that must be decided and perhaps testimony from an economist will be offered on that point to assist the Commission in deciding that issue.

B. Changed Conditions on Which the Rate Change Is Based

The Ratepayers argue that Corsicana has the burden of proving the changed conditions that are the basis for the change in its rates. Corsicana and the ED respond that the Ratepayers have the burden of showing that Corsicana did not demonstrate such changed conditions. In any event, Corsicana claims that it reasonably demonstrated changed conditions that were the basis for its change of rates. The ED agrees with Corsicana on that point.

¹⁷⁷ Tr. 1037-38.

¹⁷⁸ Tr. 854; NCWR Ex. K at 14-16.

¹⁷⁹ NCWR Ex. K at 1-2; Corsicana Ex. 2 at 2-3 & AMM-1.

¹⁸⁰ ED Ex. 1 at 1 & BDD-1.

The ALJ finds that Corsicana has demonstrated at least one changed condition that reasonably served as a basis for Corsicana's rate change.

Corsicana relies in part on cost-of-service evidence to claim that conditions had changed. As previously discussed, the ALJ finds that evidence is irrelevant in this proceeding to determine if the protested rates adversely affect the public interest.

Corsicana also offered a changed-condition argument that the ALJ believes is sufficiently separate from its cost of service as to be relevant in this public-interest inquiry. It claims that its primary basis for changing its rates was a change in the financial condition of its Utility Fund. The Utility Fund is a separate accounting for Corsicana's water and sewer service revenues and expenses. At the time of the rate change, the Utility Fund had a \$1 million shortfall.¹⁸¹ Ms. Standridge testified that Corsicana does not operate on credit; therefore, it must have a cash reserve available.¹⁸² Mr. Mullins testified that he did not believe that anybody would expect to operate a utility in Texas with September 30th as its end of year without having some type of reserve to cover potential shortfalls and emergencies.¹⁸³ There is no evidence to contradict Corsicana's claim that it had a \$1 million deficit in its Utility Fund when it changed its rates or that it reasonably needed a reserve to provide water service.

It is certainly possible that the deficit in the Utility Fund was caused wholly or partially by water-service rates that were too low to cover the cost of providing that service. The deficit could also have been caused in whole or in part by sewer service rates that were too low or by unreasonably high water or sewer service expenses, or both. Drilling down further, it might be that the deficit in the Utility Fund was due to rates for certain types of customers being lower than the cost of serving them while other customers paid rates that were sufficient to cover the

¹⁸¹ NCWR Ex. 23 at NCWR 000175.

¹⁸² Tr. 782:13-783:3 (Connie Standridge).

¹⁸³ Tr. 1160.

cost of their service. However, those are all cost-of-service issues that are outside the scope of the current proceeding to determine whether the protested rates adversely affect the public interest.

Regardless of its cause or causes, the uncontradicted evidence shows that the shortfall in the Utility Fund existed at the time that Corsicana raised its water rates. Since the evidence also shows that an operating reserve is necessary to pay for emergencies and shortfalls in the cost of providing water service and that the Utility Fund served as Corsicana's operating reserve for that purpose, the ALJ concludes that the deficit in the Utility Fund, regardless of its cause or causes, was a changed condition that gave Corsicana a reasonable basis for increasing its water rates.

C. Revenue Requirement and Rate Computation Methodology Changes

The Ratepayers contend that Corsicana changed its methodology for computing its rates when it switched from a uniform to an inclining-block volumetric rate structure. It claims that the tiers of the inclining blocks were deliberately set so that average in-city, residential customers would not pay any of the rate increase, while out-of-city wholesale customers, like them, would always pay the highest rates due to their consistent, high volume usage.

Corsicana and the ED respond that the change from uniform to inclining-block rates is a change in rate design, not methodology. They argue that the Ratepayers have failed to show that Corsicana changed its methodology for computing its revenue requirement or rate.

The ALJ finds that the change in Corsicana's rate design reflects an underlying change in a rate computation methodology. However, he does not find that the change was abusive.

The Ratepayers' wholesale contracts with Corsicana in the 1960s and early 1970s contained declining block rates.¹⁸⁴ Corsicana then began charging a flat volumetric rate, as reflected in later contracts.¹⁸⁵ Just before the rates protested in this case were adopted, Corsicana's rates included a \$3.00 per 1,000 gallons charge after the first 1,000 gallons.¹⁸⁶

The protested rates include an inclining-block structure for gallons consumed after the first 10,000 gallons. Each customer pays a monthly base rate, which is determined by the size of the customer's meter.¹⁸⁷ The base rate includes the first 1,000 gallons that the customer uses. A customer that consumes more than 1,000 gallons in a month pays \$3.00 per 1,000 gallons up to 10,000 gallons, \$3.15 per 1,000 from 10,000 to 25,000, and \$3.25 per 1,000 over 25,000.¹⁸⁸

Corsicana denies that its adoption of an inclining-block rate design shows that it changed its methodology for computing its revenue requirement or rates. It argues that evidence of a change between the Cash Basis and the Utility Basis for determining revenue requirement would be necessary to find that Corsicana changed its revenue requirement or rate methodology.¹⁸⁹ In his testimony, the ED's Mr. Dickey's agreed that a change between the Cash and Utility methods would be a change in methodology, and he noted that there was no evidence of such a change.¹⁹⁰

The terms "cost of service" and "revenue requirement" are synonymous, and the Cash and Utility Bases are methods used to compute them.¹⁹¹ Both the Cash Basis and the Utility Basis include operation and maintenance expense when calculating revenue requirement.

¹⁸⁴ E.g. NCWR Ex. 2 at 4; NCWR Ex. 4 at 2; NCWR Ex. 6 at 4; NCWR Ex. 8 at 4; NCWR Ex. 15 at 5; NCWR Ex. 19 at 2.

¹⁸⁵ E.g. NCWR Ex. 10 at 2; NCWR Ex. 20 at 3.

¹⁸⁶ NCWR Ex. 23 at NCWR 000179.

¹⁸⁷ Some Ratepayers have more than one meter.

¹⁸⁸ NCWR EX 25 at NCWR 000250.

¹⁸⁹ Corsicana Reply at 4.

¹⁹⁰ B. Dickey Prefiled Direct at 25.

¹⁹¹ See 30 TAC § 291.129(3) & (4).

Additionally, the Cash Basis includes debt service requirements and capital expenditures which are not debt financed, while the Utility Basis instead includes depreciation and return on investment.¹⁹²

It is true that there is no evidence that Corsicana has changed between the Cash and Utility Basis methods for computing its cost of service. On the other hand it is not completely clear what method Corsicana used to compute its revenue requirement. As discussed above at length, Corsicana's cost of service is outside the scope of this case.¹⁹³ Thus, unless it is shown in this proceeding that its rates affect the public interest, Corsicana is not required to set its rates based on its cost of service or to even compute its cost of service, much less decide whether to use a Cash or Utility Basis to make that computation.

However, the Ratepayers are not arguing that Corsicana switched between the Cash and Utility Bases for calculating cost of service. Instead they are contending that another type of change, one in rate design, is a type of methodological change that must be taken into account under the public-interest factors. The ALJ agrees with the Ratepayers up to a point.

The ED's Mr. Dickey testified that that the change from a uniform-block volumetric rate to inclining-block volumetric rates is a change in rate design, not methodology.¹⁹⁴ The ED contends that 30 TAC § 291.133(a)(3)(C) focuses on the methodology of computing the rate, not on how Corsicana decides to collect its costs from the customers through the rate design.

Corsicana's Ms. Standridge agreed that from a purchaser's perspective the rate structure has changed for the worse over time.¹⁹⁵ However, she testified that the method of computing that rate did not change, even though Corsicana's rate design now includes a tiered volumetric

¹⁹² 30 TAC § 291.129(3) and (4).

¹⁹³ 30 TAC § 291.133(b).

¹⁹⁴ Direct Testimony of Brian Dickey at 25:13-14.

¹⁹⁵ Tr. at 687:15-18 (Standridge, April 1, 2011).

rate.¹⁹⁶ She stated that Corsicana continues to use the same rate methodology by taking its fixed expenses and calculating the base rate and taking its variable expenses and calculating the volumetric rate.¹⁹⁷ Without a cost of service study to determine what Corsicana's fixed and variable expenses are, however, the ALJ has no way of determining whether the gallonage charges recover only variable expense, much less whether the inclining blocks reflect variable cost differences.

More importantly, the ALJ does not agree with the ED's and Corsicana's underlying assumption that 30 TAC § 291.133(a)(3)(C) should be interpreted narrowly to focus only on the methodology that the wholesale provider used to calculate its revenue requirement. Instead, the rule suggests that changes in either the "revenue requirement" or "rate" computation methodologies might be a sign of monopoly abuse. The ED and Corsicana are treating the rule's reference to "rate" as a redundancy when they argue that only changes in the "revenue requirement" computation methodology might indicate monopoly abuse.

Is a change in the rate design even to be considered under 30 TAC § 291.133(a)(3)(C)? In part that turns on the meaning of the word "methodology." None of the Commission's wholesale-service rule defines "methodology." To determine what that word means one must look to the context in which it is used, the rules of grammar, legal definitions and common and acquired meanings.¹⁹⁸ One of the common meanings of "methodology" is "A body of practices, procedures, and rules used by those who work in a discipline or engage in an inquiry; a set of working methods."¹⁹⁹

¹⁹⁶ Direct Testimony of Connie Standridge at 6:12-13.

¹⁹⁷ Tr. 768. The ED also cites the McLain study, NCWR Ex. 24 at 8, for this proposition, but the ED attaches no evidentiary weight to that study.

¹⁹⁸ TEX. GOV'T. CODE ANN. (Gov't Code) §§ 311.002(4) & 311.011.

¹⁹⁹ "methodology." The American Heritage® Dictionary of the English Language, Fourth Edition. 2003. Houghton Mifflin Company 8 Jul. 2011 <http://www.thefreedictionary.com/methodology>

Mr. Stowe works and has expertise in the field of setting water rates. He testified that Corsicana's change from uniform to inclining-block gallonage rates was a change in "rate methodology" and evidences its abuse of its monopoly.²⁰⁰ Corsicana's rate expert, Mr. Mullins, did not analyze whether the change to inclining-block rates was evidence of monopoly abuse.²⁰¹ That is because he testified that in reviewing Corsicana's rates he did not find that there had been a change in rate methodology.²⁰² He preferred to refer to the change to inclining-block rates as a change in "rate design." However, he later admitted that the American Water Works Association Manual (AWWA Manual) uses the term "methodology" when referring to rate designs. Given that, Mr. Mullins agreed that a rate design change could also be referred to as a change in "methodology."²⁰³ The ALJ concludes that the AWWA Manual's referring to rate design as a methodology is some evidence that a rate design is or is based on a methodology. As the ALJ indicated during the hearing, the Ratepayers had "scored a point."²⁰⁴

Does the broader context of the Commission's wholesale-service rules support the idea that a rate design is or reflects a rate methodology? Only two of the wholesale-service rules in subchapter I of chapter 291 mention the word "methodology." The first is the one at issue, 30 TAC § 291.133(a)(3)(C). The other is 30 TAC § 291.135, which applies when the Commission determines cost of service in the second phase of a wholesale rate case if it first determines that the public interest will be affected by a protested rate. 30 TAC § 291.135 states:

(a) The commission shall follow the mandates of the Texas Water Code, Chapters 11, 12, and 13, to calculate the annual cost of service. The commission shall rely on any reasonable methodologies set by contract which identify costs of providing service and/or allocate such costs in calculating the cost of service.

²⁰⁰ NCWR Ex. K at 27.

²⁰¹ Corsicana Ex. 2 at 6.

²⁰² Tr. 984.

²⁰³ Tr. 993-994.

²⁰⁴ Tr. 546-48.

(b) When the protested rate was calculated using the cash basis or the utility basis, and the rate which the protested rate supersedes was not based on the same methodology, the commission may calculate cost of service using the superseded methodology unless the seller establishes a reasonable basis for the change in methodologies. Where the protested rate is based in part upon a change in methodologies the seller must show during the evidentiary hearing the calculation of revenue requirements using both the methodology upon which the protested rate is based, and the superseded methodology. When computing revenue requirements using a new methodology, the commission may allow adjustments for past payments.

Given that regulatory context, are the methodologies specifically mentioned in 30 TAC § 291.135—the Cash and Utility Bases for calculating revenue requirement—the only ones to which the Commission was referring in 30 TAC § 231.133(a)(3)(C)? Citing Section 291.135(b), Corsicana basically makes that argument. It also claims that the Commission’s decisions in the *McAllen* and *Multi-County* cases²⁰⁵ affirm its position. The ALJ disagrees with Corsicana on that point.

In the *McAllen* and *Multi-County* cases, the Commission found that there was no evidence that the wholesale sellers had changed from using the Cash Basis to the Utility Basis method to calculate their revenue requirements and set their rates. It also found that the sellers did not change the computation of their revenue requirements or rates from one methodology to another and concluded that the wholesale purchasers failed to demonstrate by a preponderance of the evidence that the protested rates were adverse to the public interest.²⁰⁶

However, nowhere in those cases did the Commission conclude that switches between the Cash and Utility Bases were the only methodological changes that might indicate monopoly abuse. Nor did the Commission cite 30 TAC § 291.135 as the source of, much less a limitation

²⁰⁵ *Order Denying City of McAllen's Appeal of the Wholesale Water Rate Increase of Hidalgo County WID No. 3*, SOAH Docket No. 582-02-2470; TCEQ Docket No. 200101583-UCR (Apr. 23, 2003); and *Order Denying Multi-County WSC's Appeal of the Wholesale Water Rate Increase Imposed by the City of Hamilton*, Application No. 36280-M; TCEQ Docket No. 2009-0048-UCR; SOAH Docket No. 582-09-2557 (Jun. 17, 2010)

²⁰⁶ *McAllen* at FOF 42 – 48 and COL 11 and *Multi-County* at FOF 55 – 57 and COL 14.

on, the meaning of the word “methodology” as used in 30 TAC § 291.133(a)(3)(C). Nor did the Commission hold that a change in the method for computing rate design, referred to as a rate methodology in the AWWA manual, was not a change in methodology for computing rates. In fact, rate design was not at issue or even mentioned in the *McAllen* or the *Multi-County* case. The ALJ concludes that the *McAllen* and *Multi-County* cases are not applicable precedents for determining whether a change in the method of designing rates is a change in rate computation methodology.

Additionally, nothing in the preamble to the adoption of the wholesale-service rules indicates that the Commission intended to narrowly construe 30 TAC § 291.133(a)(3)(C) as advocated by the ED and Corsicana. Methodologies for determining revenue requirement are discussed at length in the preamble, including the Cash Basis, Utility Basis, and methodologies that the parties have agreed on in their contract. But those discussions concern the Commission’s setting rates after and if the Commission first finds that the protested rate adversely affects the public interest. The preamble does not address methodological changes within the context of the public-interest determination.

Given the common meaning of methodology and the AWWA Manual’s use of the term “methodology” when referring to rate designs, the ALJ concludes that 30 TAC § 291.133(a)(3)(C) is broad enough to include changes in the method of computing a rate design. That means that a change in the method of computing a rate design could be indicative of abuse of monopoly power by the wholesale provider. However, the evidence does not show that the change Corsicana made was abusive.

Under the 2009 Rate Ordinance, which adopted the protested rates, “Residential and Commercial (Inside City Limits)” customers are in “Class I.” The ordinance compares the previous rates and the new rates. For both it specifies that the base and volumetric rates for

“Wholesale Contract Customers” are the “Same as Class I.”²⁰⁷ Additionally, Ms. Standridge testified that since 2001, Corsicana has charged rates that include a base rate and a volumetric rate, which are the same for its wholesale customers as its inside-city retail customers.²⁰⁸

The Ratepayers argue that Corsicana abused its monopoly power not so much by the mere fact that it changed rate methodologies, but by the actual rate methodology that it adopted. First, the 2009 Rate Increase removed all gallonage over 1,000 that had been included for all meter sizes larger than 5/8 x 3/4. All of the Ratepayers have larger meters,²⁰⁹ but virtually all of Corsicana’s residential customers have 5/8 or 3/4-inch meters.²¹⁰ This resulted in no loss of water by Corsicana’s residential customers, but the loss of up to 95,600 gallons per month for the wholesale customers.²¹¹ Even more, they complain about Corsicana’s adoption of inclining-block rates. They contend that this results in the Ratepayers, who buy millions of gallons per month, paying the highest tier rate on 99% of the water they buy,²¹² whereas Corsicana’s average residential customer pays the lowest tier—the same rate charged before the 2009 Rate Increase.²¹³

Corsicana responds that the evidence demonstrates that all *high-volume* customers, not just wholesale customers, pay the highest tier rate for most of their water consumption. Wholesale customers are not the only customers who consume more than 25,000 gallons per month. The undisputed evidence is that 689 of Corsicana’s *retail* customers pay third tier rates,

²⁰⁷ NCWR Ex. 25 at NCWR 000250.

²⁰⁸ Corsicana Ex. 1 at 6:2-20. Ms. Standridge also testified that the wholesale customers’ contracts require that the wholesale rate be the same as the rate charged to retail customers residing inside Corsicana and that methodology continues to be honored by the City with the 2009 Rate Ordinance. Corsicana Ex. 1 at 6. As previously discussed, whether the protested rates conform to the contracts between the Ratepayers and Corsicana is outside the scope of this case. For that reason, the ALJ does not evaluate this contract argument.

²⁰⁹ NCWR Ex. 62 at 8-9.

²¹⁰ Tr. at 1010:6-10 (Mullins, April 12, 2011).

²¹¹ NCWR Ex. 24 at 7; Tr. at 1008:12-1009:25 (Mullins, April 12, 2011).

²¹² Tr. at 687:10-14 (Standridge, April 1, 2011).

²¹³ Tr. at 688:9-14 (Standridge, April 1, 2011).

and 31 out of the top 50 highest consuming customers served by Corsicana are retail customers.²¹⁴ That includes one residential retail customer who uses 300,000 gallons per month.²¹⁵ Hence, Corsicana argues that the claim that the wholesale customers pay more than all of Corsicana's retail customers is not supported by the evidence, but rather is expressly contrary to the evidence.

The evidence shows that the inside-city retail rates have not been set as a sham, so that only wholesale customers are affected by the change. Instead, a significant number of inside-city, higher-consumption retail customers actually exist, and they, like the wholesale customers, are paying the highest tier gallonage rates to which the Ratepayers object. Additionally, as discussed later in the PFD, the inclining-block rates encourage conservation in keeping with Commission policy. Given that, the ALJ concludes that the change in the method for designing the rates is not abusive.

D. Other Valuable Consideration Received Incident to the Contracts

The Ratepayers do not address whether they or Corsicana received other valuable consideration incident to their contracts. In the ED's view, that gap means that the Ratepayers have not carried their burden of proving that Corsicana abused monopoly power based on this factor.

Corsicana argues that the evidence shows that the Ratepayers received valuable consideration, rebutting the Ratepayers' allegation that Corsicana abused monopoly power. However, Corsicana merely points to its discussion of the terms of the contract to support that argument. Its claim is too general to allow the ALJ to conclude that the Ratepayers received incidental valuable consideration. Corsicana also argues that it received little incidental

²¹⁴ Tr. 769-70 & 815.

²¹⁵ Tr. 771.

consideration, other than the very limited take or pay provision in the Standard Contract that was previously discussed.

The ALJ concludes that the evidence does not show that other valuable consideration was received by either the Ratepayers or Corsicana incident to the contracts.

E. Incentives Necessary to Encourage Regional Projects or Water Conservation

No evidence was offered to indicate that the protested rates encourage regional projects. According to Corsicana, the inclining-block rate structure—consistent with TCEQ policy—encourages conservation by charging high volume users more per thousand gallons and is not indicative of abuse of monopoly power. The ED agrees, but the Ratepayers do not.

Ms. Standridge testified that the tiered rates encourage wholesale customers to efficiently use water resources by looking for leaks, lowering unaccounted for water losses, and implementing the same measures that the TCEQ requires Corsicana to comply with in order to ensure efficient water use.²¹⁶ Ms. Gatewood testified that without Angus's line leakage, its water volume used in 2010 would have been lower.²¹⁷ Ms. Scott testified that Kerens could reduce the amount of water it purchases from Corsicana by fixing its line loss.²¹⁸ Ms. Standridge also testified that the Texas Water Development Board, the TCEQ, and most entities in the water business recognize that conservation is the most economical form of water supply and conservation has been encouraged at every level with which she was familiar.²¹⁹

²¹⁶ Tr. 644: 22-645:4 (Connie Standridge).

²¹⁷ *Direct Testimony of Melinda Gatewood* at 10:9-10.

²¹⁸ Tr. 411:18-21 (Cindy Scott).

²¹⁹ Tr. 793.

In response, the Ratepayers note that Ms. Standridge acknowledged that it would be impossible for wholesale customers, who purchase millions of gallons per month, to cut their usage below blocks set at 10,000 and 25,000 gallons.²²⁰ Ms. Stowe testified that it makes no sense to subject wholesale customers to inclining blocks designed around an average residential customer profile, and doing so violates industry practices.²²¹ He testified that the only reason for charging wholesale customers inclining-block rates is to push off costs on wholesale customers.²²² Even Mr. Mullins testified that if inclining blocks are going to be used, there should be different sets of inclining blocks for each customer class.²²³

It is not clear that Corsicana was free to develop a different set of inclining-block rates based on the usage pattern of its wholesale customers. Corsicana argues that the Standard Contract required it to charge the Ratepayers the same rates as inside-city customers. The Ratepayers disagree. They contend that the Standard Contract required Corsicana to charge them the minimum rates, which could have been lower than the inside-city rates and included uniform gallonage blocks or different inclining blocks designed around their usage pattern.

The ALJ need not referee this dispute over the Standard Contract as it relates to inclining-block rates. As previously indicated, the Commission assumes that protested rates correctly interpret any existing agreement between the seller and purchaser.²²⁴

The ALJ concludes that inclining-block rates encourage water conservation consistent with TCEQ and Water Development Board policy. That includes encouraging wholesale customers like the Ratepayers to search for and repair leaks. He does not find that Corsicana abused monopoly power by adopting inclining-block rates.

²²⁰ Tr. at 645:5-8 (Standridge, April 1, 2011).

²²¹ NCWR Ex. K at 25:9-13 (Stowe Prefiled).

²²² Tr. 1232.

²²³ Tr. at 1102:7-16 (Mullins, April 12, 2011).

²²⁴ NCWR Ex. 58 (19 TexReg 6227 (middle column)).

F. Corsicana's Obligation to Meet Federal and State Drinking Water Standards

Corsicana argues that the rate increase at issue in this proceeding was in part due to increased costs, attributable to Corsicana's obligation to meet federal and state drinking water standards; therefore, the protested rates do not evidence Corsicana's abuse of monopoly power.²²⁵ The ALJ does not reach that conclusion.

TCEQ rules require wholesale providers to meet minimum water system capacity requirements. To meet those requirements, a wholesale water provider must be able to provide water to all of its retail customer connections as well as the maximum amount of water obligated or pledged under all wholesale contracts.²²⁶ When the amount of water that Corsicana is obligated to provide to its retail and wholesale customers reaches 85% of its actual treatment plant capacity, it is required to begin planning expansion of its water production facilities.²²⁷ Corsicana must have a capacity of 0.6 gallons per minute per connection (the sum of its retail connections plus connection equivalents under all wholesale contracts).²²⁸ In 2007, TCEQ found Corsicana was not in compliance with this requirement, and Corsicana engaged an engineer to prepare, plan and supervise construction of a new water treatment plant to be located at Lake Halbert.²²⁹ Corsicana's Lake Halbert Treatment Plant (LHTP) can serve 4,630 connections. By 2009 it was serving 4,607 connections through its wholesale customers alone. That meant that LHTP was at 99.5% of its capacity, even without considering Corsicana's retail connections. To meet TCEQ requirements, Corsicana began the design phase of the expansion of LHTP. Ms. Standridge testified that the cost of the design alone was \$2,000,000.²³⁰

²²⁵ Corsicana Ex. 2 (Mullins Direct) at 7: 5 – 16.

²²⁶ 30 TAC § 290.45(e)(2)

²²⁷ 30 TAC § 291.93(3).

²²⁸ NCWR Ex. 62, *Summary of Investigation Findings* (2/27/2007).

²²⁹ NCWR Ex. 62, July 10, 2007 Corsicana Letter to TCEQ.

²³⁰ Corsicana Ex. 1 (Standridge Direct) at 3:24 – 4:5.

A wholesale water provider may request and obtain alternative capacity requirements; however, the ED may revoke those capacity waivers and require the seller to satisfy the minimum capacity requirements set out in the TCEQ rules.²³¹ Subsequent to the protested rates being set, Corsicana sought and obtained a capacity waiver from TCEQ. It allows Corsicana to delay actual construction of the LHTP expansion until 2015 or rescission of the waiver, which could occur at any time. However, the design of the LHTP is ongoing.²³²

Corsicana's argument is based on an alleged increase in its cost of service to comply with TCEQ drinking water capacity standards. Because its cost of service may not be considered in this public-interest phase of the case, the ALJ cannot reach the conclusion that Corsicana seeks under this factor.

G. Rates Charged in Texas by Other Sellers of Water for Resale

Based upon evidence concerning the rates charged in Texas by other sellers of water service for resale, Corsicana argues that the protested rates do not evidence Corsicana's abuse of monopoly power in providing water service to the Ratepayers. The Ratepayers do not address this factor. The ED and the ALJ agree with Corsicana.

Corsicana offered evidence of the wholesale rates charged by other providers relatively near Corsicana. Waxahachie's volumetric rate for wholesale customers is \$3.45 per 1,000 gallons, compared to Corsicana's top tier rate of \$3.25 per thousand gallons. The Lake Granbury Surface Water and Treatment System, owned and operated by the Brazos River Authority, provides wholesale treated water only, at an average rate of \$3.97 per 1,000 gallons.²³³

²³¹ See 30 TEX. ADMIN. CODE § 290.45(g) and 290.45(g)(6)

²³² Tr. 649: 20 – 25 (Standridge).

²³³ Corsicana Ex. 2 (Mullins Direct) at 8:1 – 13.

Rice's water supply contract with Ennis entitles Rice to purchase 2.7 MGM of water.²³⁴ Rice currently pays Ennis \$3.00 per thousand gallons²³⁵ with a \$6,750 monthly minimum payment.²³⁶ If Rice bought the maximum volume under the Ennis contract, it would pay an effective rate of \$5.50 per 1,000 gallons.²³⁷ That is substantially higher than Rice's effective rate with Corsicana of \$3.389 per 1,000 gallons.²³⁸

The ALJ concludes that the rates charged by other sellers of water for resale in Texas do not suggest that Corsicana's rates indicate an abuse of monopoly power.

H. Comparison of Corsicana's Retail Rates and Ratepayers' Retail Rates Due to Corsicana's Wholesale Rates

Rule 30 TAC § 291.133(a)(3)(H) requires "... the seller's rates for water ... service charged to its retail customers [to be] compared to the retail rates the purchaser charges its retail customers as a result of the wholesale rate the seller demands from the purchaser ...". The ALJ finds that this rate comparison does not indicate an abuse of monopoly power by Corsicana.

Corsicana and the ED argue that 30 TAC § 291.133(a)(3)(H) requires a comparison of what Corsicana's retail customers pay and what the Ratepayers' retail customers pay due to Corsicana's wholesale rates. The Ratepayers offer other comparisons. The ALJ agrees with the ED and Corsicana that this rule calls for a comparison of the impact on retail customers due to Corsicana's rates and not for other comparisons.

²³⁴ Tr. 327.

²³⁵ Tr. 324-325.

²³⁶ Tr. 326-327.

²³⁷ $\$6,750 + (2,700 \text{ TG} @ \$3.00/\text{TG} = \$8100) = \$14,850/2,700 = \$5.50/\text{TG}$. Tr. 327 – 329.

²³⁸ Corsicana Ex. 23.

Corsicana compared the base and volumetric rates charged by the Ratepayers to their retail customers before and after Corsicana increased its rates.²³⁹ It also calculated the portion of each Ratepayer's base rate not attributable to Corsicana. Corsicana claims that this analysis debunks the Ratepayers' suggestion that the retail rates they charge resulted from Corsicana's 2009 Rate Change. However, this analysis is confusing and leads to tangential considerations. For example, Corsicana discusses whether the Ratepayers passed on Corsicana's rate increase to their retail customers or absorbed it. The ALJ concludes this type of analysis is not necessarily required by 30 TAC § 291.133(a)(3)(H) and is not particularly helpful.

The ED and Corsicana presented other analyses that comply with 30 TAC § 291.133(a)(3)(H) and are more to the point and helpful.²⁴⁰ They calculated the average cost per 1,000 gallons that a Ratepayer would need to recover from its average residential retail customer to pay Corsicana after Corsicana increased its rates. That amount is compared to what a Corsicana retail customer would pay Corsicana for that same amount of water after Corsicana's rate increase. This is a straightforward apples-to-apples comparison. It avoids detours to examine other factors that might impact the rates that the Ratepayers charge their retail customers. It goes directly to the heart of the 30 TAC § 291.133(a)(3)(H) concern: Has Corsicana set its rates in a way that impacts its retail customers less and the retail customers of its wholesale customers more? The comparison shows that Corsicana has not.

Corsicana charges each of its customers monthly base rates that are determined by the size of the customer's meter.²⁴¹ It also charges a tiered volumetric rate. For Corsicana's wholesale customers and its inside city retail customers, the base and volumetric rates are the same.²⁴² Nearly all of Corsicana's residential customers and many of its small commercial

²³⁹ Corsicana's Initial Brief at 31-34 and Reply Brief at 36-38.

²⁴⁰ ED Initial Brief at 21-25 & Corsicana Exs. 5, 8, 11, 13, 16, 17, 19, 23 & 26

²⁴¹ Some wholesale customers have more than one meter.

²⁴² *Direct Testimony of Connie Standridge* at 15:19-16:11. *See also*, Ex. NCWR Ex. 25 at NCWR 000250.

customers have 5/8- or 3/4-inch meters.²⁴³ Each average residential customer uses an average of 6,000 gallons per month, just like the Ratepayers' residential customers.²⁴⁴ The base rate is \$17.60 for a 5/8- or 3/4-inch meter with the first 1,000 gallons included. The volumetric rate is \$3.00 per 1,000 gallons for 1-10,000 gallons, \$3.15 per 1,000 gallons for 10,001-25,000 gallons, and \$3.25 per 1,000 gallons for over 25,000 gallons.²⁴⁵ Accordingly, an average in-city retail customer of Corsicana would be billed \$32.60 for water.²⁴⁶ That translates into an average Corsicana retail customer paying an average of \$5.43 per 1,000 gallons for the 6,000 gallons that it uses.²⁴⁷

To calculate the average rate per 1,000 gallons that a Ratepayer would need to recover from an average retail customer to pay Corsicana, the Ratepayer's base rate is divided by the number of its retail connections and to that is added the volumetric charge for 6,000 gallons of water.²⁴⁸ Each Ratepayer is able to allocate to each of its retail customers a portion of the base rate that it pays to Corsicana. This provides a lower effective base rate per each of the Ratepayers' end user connections.²⁴⁹ For the volumetric charge, the Ratepayers pay Corsicana's 3rd tier rates on almost all of the water that they purchase from Corsicana.²⁵⁰ Therefore, the Ratepayers pass through a volumetric rate of \$3.25 per thousand gallons to their retail customers.²⁵¹ Since the Ratepayers purchase most of their water at the \$3.25 rate, the Ratepayers volumetric charge for 6,000 gallons of water is \$19.50.

²⁴³ Tr. 581 & 1189.

²⁴⁴ Tr. 800 & 1232.

²⁴⁵ *Direct Testimony of Connie Standridge* at 15:19-16:11. *See also*, Ex. NCWR Ex. 25 at NCWR 000250.

²⁴⁶ $\$17.60 + (\$3.00 \times 5) = \$32.60$. Corsicana's base rate includes 1,000 gallons. *See also* Corsicana Ex. 28.

²⁴⁷ $\$32.60/6 = \5.43 . *See also*, Tr. 1139:8-14 (Allen Mullins).

²⁴⁸ *E.g.* Corsicana Exs. 5, 8, 11, 13, 16, 17, 19, 23 & 26.

²⁴⁹ *Direct testimony of Connie Standridge* at 16:25-26.

²⁵⁰ *Direct Testimony of Jack Stowe* at 29:20-22.

²⁵¹ *See* NCWR Ex. 25 at NCWR 000250.

Based on the above, the following table shows the average rate per 1,000 gallons that each Petitioner's average retail customer pays due to Corsicana's wholesale rate:

Monthly Charges to Ratepayers' Average Residential Retail Customers Due To Corsicana's Rates²⁵² (per 1,000 gallons)					
[A] Petitioner	[B] Base Rate Charged by Corsicana	[C] Number of Petitioner's Retail Connections	[D] = [B] ÷ [C] Petitioner's Retail Customer's Base Rate Attributable to Corsicana's Wholesale Rate	[E] = ([D] + (\$3.25 x 6)) Monthly Water Rate as a Result of Corsicana's Wholesale Rate	[F] = [E] ÷ 6 Petitioner's Retail Customer's Rate per 1,000 gallons Resulting from Corsicana's Wholesale Rate
Angus	\$386.02 ²⁵³	359 ²⁵⁴	\$1.08	\$20.58	\$3.43
Blooming Grove	\$292.55 ²⁵⁵	430 ²⁵⁶	\$0.68	\$20.18	\$3.36
Chatfield	\$970.53 ²⁵⁷	1,411 ²⁵⁸	\$0.69	\$20.19	\$3.36
Community Water Co.	\$479.49 ²⁵⁹	417 ²⁶⁰	\$1.15	\$20.65	\$3.44
Corbet	\$467.94 ²⁶¹	820 ²⁶²	\$0.57	\$20.07	\$3.35
Frost	\$292.55 ²⁶³	247 ²⁶⁴	\$1.18	\$20.68	\$3.45

²⁵² This table reflects calculations presented in the ED's Initial Brief based on the cited evidence. Corsicana Exs. 5, 8, 11, 13, 16, 17, 19, 23 & 26 use the same method and calculate very slightly different rates per 1,000 gallons.

²⁵³ Corsicana Ex. 13.

²⁵⁴ Direct Testimony of Melinda Gatewood at 4:1-2.

²⁵⁵ Corsicana Ex. 26.

²⁵⁶ Direct Testimony of Chris Ivey at 3:19-20.

²⁵⁷ Corsicana Ex. 5.

²⁵⁸ Direct Testimony of James Metcalfe at 3:20-21.

²⁵⁹ Corsicana Ex. 16.

²⁶⁰ Direct Testimony of Scott Hampel at 4:5-6.

²⁶¹ Corsicana Ex. 11.

²⁶² Direct Testimony of David Weinkauff at 3:20-21.

²⁶³ Ex. NCWR Ex. 11 at 2.

²⁶⁴ Direct Testimony of Velma Ballew at 3:19-20.

Monthly Charges to Ratepayers' Average Residential Retail Customers Due To Corsicana's Rates²⁵² (per 1,000 gallons)					
[A] Petitioner	[B] Base Rate Charged by Corsicana	[C] Number of Petitioner's Retail Connections	[D] = [B] ÷ [C] Petitioner's Retail Customer's Base Rate Attributable to Corsicana's Wholesale Rate	[E] = ([D] +(\$3.25 x 6)) Monthly Water Rate as a Result of Corsicana's Wholesale Rate	[F] = [E] ÷ 6 Petitioner's Retail Customer's Rate per 1,000 gallons Resulting from Corsicana's Wholesale Rate
Kerens	\$173.39 ²⁶⁵	750 ²⁶⁶	\$0.23	\$19.73	\$3.29
M.E.N.	\$497.31 ²⁶⁷	1,412 ²⁶⁸	\$0.35	\$19.85	\$3.31
Navarro Mills	\$584.51 ²⁶⁹	1,210 ²⁷⁰	\$0.48	\$19.98	\$3.33
Rice	\$2,747.89 ²⁷¹	3,156 ²⁷²	\$0.87	\$20.37	\$3.40

Thus an average residential retail customer pays the Ratepayers \$3.45 or less for 1,000 gallons of water due to the wholesale rates that Corsicana charges the Ratepayers. At the same time, Corsicana's own average retail customer pays Corsicana \$5.43 for 1,000 gallons of water.²⁷³

Other rate comparisons are possible, and the Ratepayers offered and advocate several as described below. However, the ALJ agrees with the ED and Corsicana that the Ratepayers are

²⁶⁵ Corsicana Ex. 17.

²⁶⁶ *Direct Testimony of Cindy Scott* at 4:3-4.

²⁶⁷ Corsicana Ex. 8.

²⁶⁸ *Direct Testimony of Dennis Donoho* at 3:19-20.

²⁶⁹ Corsicana Ex. 19.

²⁷⁰ *Direct Testimony of Danny Gordon* at 3:20-21.

²⁷¹ Corsicana Ex. 23.

²⁷² *Direct Testimony of Joey Smith* at 4:20-21.

²⁷³ $\$32.60/6 = \5.43 . *See also*, Tr. 1139:8-14 (Allen Mullins).

suggesting rate comparisons that are not required by or relevant under the Commission's public-interest rules.

The Ratepayers think that the most important comparison is between the average volumetric rate that each of them pays and the average volumetric rate that an average retail customer of Corsicana pays Corsicana for water. The Ratepayers claim that comparison demonstrates Corsicana's abuse of monopoly power. Mr. Stowe presented such a comparison as a methodology-behind-the-methodology argument under 30 TAC § 291.133(a)(3)(C).²⁷⁴ The Ratepayers also cite that comparison when arguing under 30 TAC § 291.133(a)(3)(H).²⁷⁵

Each of the Ratepayers purchases far more than 25,000 gallons of water per month. Each would pay \$3.25 for most of their 1,000-gallon blocks, which is the third-tier rate. Corsicana's average residential retail customer purchases 6,000 gallons per month. Corsicana also has higher volume industrial and agricultural retail customers. Taking all of them together, the average Corsicana retail customer uses 10,869 gallon of water per month. Only a small portion of that purchase would be above the first tier rate of \$3.00 per 1,000-gallons, which tops out at 10,000 gallon. Given that, Mr. Stowe estimated that Corsicana's average retail customer would pay an average of \$3.01 per 1,000-gallon block. The Ratepayers contend that the difference between \$3.25 per 1,000 gallons that they pay on average and the \$3.01 per 1,000 gallons that Corsicana's retail customers pay on average indicates Corsicana's abuse of monopoly power.²⁷⁶

The Commission's monopolistic abuse rule does not require a comparison between average volumetric rates paid by a provider's wholesale and retail customers. Perhaps that is because, as previously discussed, a wholesale customer can spread the base rate that it pays a wholesale provider over its many retail customers. That lowers the average rate per 1,000 gallon

²⁷⁴ NCWR Ex. K at 27-29.

²⁷⁵ Ratepayers Reply at 36.

²⁷⁶ NCWR Ex. K at 10-12 & 27-29.

that an average retail customer of a wholesale customer pays due to the wholesale provider's rates.

Additionally, the Ratepayers compare the average monthly bill that their average retail customer pays to the average monthly bill that an average Corsicana retail customer pays. Assuming an average use of 6,000 gallons per month, Mr. Stowe testified that an average residential retail customer of a Ratepayer would pay a significantly higher monthly bill, ranging from \$75.90 (Frost) to \$49.50 (Rice), than a similar Corsicana retail customer, who would pay \$32.60.²⁷⁷ This comparison is not required by the public-interest rule and is meaningless.

As Mr. Dickey testified, there are numerous reasons that might explain why a wholesale purchaser's retail rates are higher than a wholesale seller's retail rates.²⁷⁸ Most obviously, all of the Ratepayers in this case have their own operation and maintenance costs which contribute to their retail rates being higher than Corsicana's retail rates.²⁷⁹ Corsicana's expert, Mr. Mullins, testified, "The higher rates to the wholesale customer's end users are the result of the wholesale customers' cost over and above the cost to purchase water from Corsicana, and are not attributed to Corsicana's wholesale rate."²⁸⁰

The ALJ concludes that the comparison called for by 30 TAC § 291.133(a)(3)(H) shows that an average residential retail customer pays a Ratepayer \$3.45 or less for 1,000 gallons of water due to the wholesale rates that Corsicana charges the Ratepayers, while Corsicana's own average retail customer pays Corsicana \$5.43 for 1,000 gallons of water. The ALJ concludes that this comparison does not indicate Corsicana's abuse of monopoly power

²⁷⁷ NCWR Ex. K at 30 and Ex. 55, Tr. 564-66 and Corsicana Ex. 27.

²⁷⁸ *Direct Testimony of Brian Dickey* at 28:5-9.

²⁷⁹ *Id.* See also, *Direct Testimony of Jack Stowe* at 30:1-4.

²⁸⁰ *Direct Testimony of Allen Mullins* at 9:9-12.

I. Monopoly Abuse and Public-Interest Conclusion

Although it is true that the Ratepayers have few or no alternatives to Corsicana for obtaining water, the evidence does not show that Corsicana has abusively limited those alternatives. Moreover, the rates that Corsicana charges do not indicate monopoly abuse.

Corsicana had a \$1 million deficit in its Utility Fund reserve when it increased its rates, which was a changed condition and a reasonable basis for increasing its rates. The evidence does not show that Corsicana changed its methodology for computing its revenue requirement. The methodology for computing the rate design apparently changed, as evidenced by the switch to inclining-block rates, but that change was not abusive. The inclining-block rates encourage conservation. The Ratepayers pay the same rates for wholesale service as inside-city customers pay for retail service. Numerous high-consuming inside-city retail customers exist who pay the same highest tier gallonage charges as the wholesale Ratepayers.

On an average per-1,000-gallons basis, the rates that the Ratepayers pay Corsicana are actually lower than what one of the Ratepayers pays an alternative provider, lower than what some of the Ratepayers might have paid another alternative provider, and lower than the rates charged by other wholesale providers in the same region of Texas. The Ratepayers' average residential retail customer pays \$3.45 or less on average for 1,000 gallons of water due to Corsicana wholesale rates, while Corsicana's own average retail customer pays \$5.43 on average for that same quantity.

Based on the above, the ALJ concludes that the Ratepayers have failed to show that Corsicana's rates evidence its abuse of monopolistic power in its provision of water service to them or that Corsicana's rates adversely affects the public interest.

IX. TRANSCRIPTION COSTS

Because the hearing was scheduled for more than one day, the ALJ ordered the Ratepayers to arrange for and pay a court reporter to record and transcribe the hearing on the merits and to deliver the original transcript to the ALJ and two copies to the TCEQ's Chief Clerk. He also indicated that when the Commission made a final decision in this case, the costs of the recording and transcription would be allocated among the parties in accordance with 30 TAC § 80.23.²⁸¹

The Parties have not addressed the allocation of the transcript cost or offered specific evidence of that cost. Nevertheless, based on the record, the ALJ recommends that the Commission assess each of the ten Ratepayers and Corsicana 1/11th of the cost of the transcript and copies provided to the ALJ and the TCEQ.

Commission rule 30 TAC § 80.23(d) provides that the Commission will not assess transcript costs against the ED or the OPIC and that it will consider the following relevant factors in allocating reporting and transcription costs among the other parties:

- the party who requested the transcript;
- the financial ability of the party to pay the costs;
- the extent to which the party participated in the hearing;
- the relative benefits to the various parties of having a transcript;
- the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- any other factor which is relevant to a just and reasonable assessment of costs.

²⁸¹ Order No. 6.

Because the ALJ ordered the transcript, no Party requested it, though the Parties may have ordered copies for their own use. The Ratepayers and Corsicana fully participated in the hearing and benefited from the transcript, as evidenced by the transcript and their post-hearing briefs. There is no evidence that justice requires a certain allocation. There is no evidence of budgetary constraints or whether the expense of this proceeding may be recovered through utility rates.

There is no specific evidence concerning the Ratepayers' or Corsicana's ability to pay for a transcript. However, Community is an investor owned water utility,²⁸² most of the rest are water supply corporations, and the remaining are cities with tax bases. All are providing water service for compensation. Ranked by connections served, Frost is the smallest Ratepayer and serves 247 connections.²⁸³ Rice is the largest and serves 3,156 connections.²⁸⁴ Corsicana and the Ratepayers were all represented by competent and experienced counsel throughout the long prehearing and 5-day hearing process.

Given these facts, the ALJ finds it reasonable to infer that Corsicana and each of the Ratepayers can pay 1/11th of the cost of the transcript and copies for the ALJ and TCEQ.

²⁸² NCWR Ex. F at 1-2.

²⁸³ *Direct Testimony of Velma Ballew* at 3:19-20.

²⁸⁴ *Direct Testimony of Joey Smith* at 4:20-21.

X. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached Proposed Order, deny NCWR's and the Ratepayers' petitions to review Corsicana's wholesale water rates, and order Corsicana and each of the Ratepayers to pay 1/11th of the cost of the transcript of the hearing and the copies provided to the TCEQ and the ALJ.

SIGNED August 17, 2011.



**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**DENYING THE PETITIONS OF NAVARRO COUNTY WHOLESALE RATEPAYERS, M.E.N. WATER SUPPLY CORPORATION, RICE WATER SUPPLY CORPORATION, ANGUS WATER SUPPLY CORPORATION, CHATFIELD WATER SUPPLY CORPORATION, CORBET WATER SUPPLY CORPORATION, NAVARRO MILLS WATER SUPPLY CORPORATION, CITY OF BLOOMING GROVE, CITY OF FROST, CITY OF KERENS, AND COMMUNITY WATER COMPANY TO REVIEW THE WHOLESALE RATE INCREASE IMPOSED BY THE CITY OF CORSICANA, CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 10776, IN NAVARRO COUNTY,
TCEQ DOCKET NO. 2009-1925-UCR,
SOAH DOCKET NO. 582-10-1944**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the petitions of Navarro County Wholesale Ratepayers (NCWR), M.E.N. Water Supply Corporation (M.E.N.), Rice Water Supply Corporation (Rice), Angus Water Supply Corporation (Angus), Chatfield Water Supply Corporation (Chatfield), Corbet Water Supply Corporation (Corbet), Navarro Mills Water Supply Corporation (Navarro Mills), the City of Blooming Grove (Blooming Grove), the City of Frost (Frost), the City of Kerens (Kerens), and Community Water Company (Community) to review a wholesale rate increase imposed by the City of Corsicana (Corsicana) under Certificate of Convenience and Necessity No. 10776 in Navarro County. A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the petitions on March 29, 30, and 31 and April 1 and 12, 2011, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Jurisdiction

1. On August 4, 2009, the City of Corsicana (Corsicana) adopted new rates for the retail and wholesale water service that it provides.
2. Each of Corsicana's ratepayers received notice of the new rates within a few days after August 4, 2009.
3. For Corsicana's wholesale customers and its inside city retail customers, the base and volumetric rates are the same.
4. Under the adopted rates, Corsicana charges each of its customers a monthly base rate that is determined by the size of the customer's meter. The base rate ranges from \$17.60 for a 5/8- or 3/4-inch meter to \$1,695.52 for a 10-inch meter. The base rate includes either the first 1,000 gallons of water used in the month.
5. For water in excess of the first 1,000 gallons used in a month, Corsicana also charges tiered volumetric rates, also known as inclining-block rates. The volumetric rate is \$3.00 per 1,000 gallons for 1-10,000 gallons, \$3.15 per 1,000 gallons for 10,001-25,000 gallons, and \$3.25 per 1,000 gallons for over 25,000 gallons.
6. On November 2, 2009, NCWR, a Texas non-profit corporation, filed the Original Petition in this case with the Commission and served it on Corsicana.
7. The Original Petition did not name anyone as a petitioner or a member of NCWR that was receiving water service from Corsicana.
8. On December 1, 2009, more than 90 days after Corsicana's ratepayers received notice of the new rates from Corsicana, a First Amended Petition was filed with the Commission

and served on Corsicana. It named NCWR, M.E.N., Angus, Chatfield, Corbet, Blooming Grove, Frost, Kerens, and Community as petitioners.

9. On March 3, 2010, the Commission's Chief clerk mailed notice of the first preliminary hearing to the attorneys of record for NCWR, M.E.N., Rice, Angus, Chatfield, Corbet, Navarro Mills, Blooming Grove, Frost, Kerens, Community, Corsicana, the Commission's Executive Director (ED), and the Commission's Office of Public Interest Counsel (OPIC).
10. The notice of the first preliminary hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
11. On March 31, 2010, the ALJ convened the first preliminary hearing as indicated in the notice.
12. Attorneys of record for NCWR, M.E.N., Rice, Angus, Chatfield, Corbet, Navarro Mills, Blooming Grove, Frost, Kerens, Community, Corsicana, the ED, and OPIC appeared at the preliminary hearings and the hearing on the merits.
13. On April 16, 2010, a Second Amended Petition was filed and served on Corsicana. It named NCWR as a petitioner. It also named as petitioners the following, who are collectively referred to hereafter as "Ratepayers": M.E.N., Rice, Angus, Chatfield, Corbet, Navarro Mills, Blooming Grove, Frost, Kerens, and Community.
14. The petitions asserted that the Commission had jurisdiction under statutes as set out below:

Petition	Jurisdictional Statutes
Original	TEX. WATER CODE ANN. (Water Code) §§ 11.041, 12.013 & 13.043
First Amended	Water Code §§ 11.041, 12.013 & 13.043(f)
Second Amended	Water Code §§ 11.036, 11.041, 12.013 & 13.043(f)

15. Each of the Ratepayers receives wholesale water service from Corsicana.

16. There is no evidence that NCWR receives water service from Corsicana.

17. Blooming Grove, Frost, and Kerens are political subdivisions of the state.

Parties

18. The following are the parties in this public-interest proceeding:

PARTY	REPRESENTATIVE
Ratepayers	Paul M. Terrill, III and Schuyler Marshall
Corsicana	J. Kay Trostle and Miguel Huerta
ED	Ron Olson and Dinniah C. Tadema
OPIC	Eli Martinez

19. NCWR is not admitted as a party in the public-interest proceeding.

Schedule

20. Below is a list of the major procedural events in this case:

DATE	EVENT
March 31, 2010	First preliminary hearing
April 16, 2010	Deadline to amend pleadings
May 3, 2010	Deadline to file written arguments on jurisdictional issues
May 19, 2010	Deadline to file written responses to arguments on jurisdictional issues
May 28, 2010	Second preliminary hearing
May 28, 2010	Ratepayers' motion for interim rates was denied by the ALJ
May 28, 2010	Discovery Begins
November 5, 2010	Ratepayers to prefile their direct case in writing, including all testimony and exhibits
January 14, 2011	Corsicana prefiles its direct case in writing, including all testimony and exhibits.
February 18, 2011	ED prefiles his direct case in writing, including all testimony and exhibits
February 25, 2011	Deadline to file dispositive motions
March 4, 2011	Deadline to take depositions
March 4, 2011	Deadline to file objections to and motions to strike any prefiled evidence
March 9, 2011	Deadline to file responses to dispositive motions
March 11, 2011	Deadline to supplement discovery responses
March 22, 2011	Deadline to file responses to objections and motions to strike prefiled evidence
March 24, 2011	Prehearing conference
March 29, 2011	Hearing on the merits of case begins
April 12, 2011	End of hearing on the merits
May 23, 2011	Deadline for filing initial closing arguments
June 27, 2011	Deadline for filing replies to closing arguments
August 26, 2011	Proposal for Decision (PFD) due date

Public-Interest Considerations Not Applicable In This Case

21. The Ratepayers have not claimed and there is no evidence that the protested rates impair Corsicana's ability to continue to provide service, based on Corsicana's financial integrity and operational capability.
22. The Ratepayers have not claimed and there is no evidence that the protested rates impair their ability to continue to provide service to their retail customers, based on their financial integrity and operational capability.
23. The Ratepayers have not claimed and there is no evidence that the protested rates are unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates Corsicana charges other wholesale customers.

***Alleged Abuse of Monopoly Power
Disparate Bargaining Power of the Parties***

24. Corsicana has disparately greater bargaining power over the Ratepayers due to their lack of alternative sources of obtaining water service.
25. Corsicana has not abused its greater bargaining power.

Ratepayers' Alternative Means of Obtaining Water

26. From 1999-2001, Rice, M.E.N., and Chatfield attempted to purchase raw water from Tarrant Regional Water District (TRWD).
27. For reasons of its own, TRWD chose not to supply water to Rice, M.E.N., and Chatfield.
28. Obtaining water from TRWD instead of Corsicana is not an alternative available to the Ratepayers.

29. Corsicana did not have and did not attempt to exercise power over TRWD to deprive Rice, M.E.N., and Chatfield of an alternative water supply.
30. TRWD's choice ten years ago to not supply water to Rice, M.E.N., and Chatfield was not due to Corsicana's abuse of disparate bargaining or monopoly power.
31. M.E.N., Angus, Chatfield, Corbet, Navarro Mills, Blooming Grove, Frost, Kerens, and Community have no viable alternative to Corsicana for obtaining water.
32. Rice obtains water from the City of Ennis (Ennis) as well as Corsicana, but Ennis does not have an adequate supply to meet Rice's needs.
33. Rice has no viable alternative to Corsicana for obtaining more water than it currently uses.
34. The Ratepayers would face large practical, legal, and other obstacles to obtaining water from another source. The cost of pipelines, regulatory uncertainty due to the need to amend the regional water plan, and environmental disturbance due to construction of infrastructure would make it difficult and expensive to obtain water from another source even if one could be found.
35. Except for Blooming Grove, Kerens and Navarro Mills, the Ratepayers have contracts with Corsicana that require them to pay Corsicana for at least a minimum amount of water even if they obtain water from another source.
36. The Ratepayers have few or no alternatives to Corsicana for obtaining water.

Alternative Costs of Water

37. To the extent that the Ratepayers have alternatives, there is no evidence that the cost of those alternatives would be lower than buying water from Corsicana.

38. Rice's water supply contract with Ennis entitles Rice to purchase 2.7 MGM of water. Rice currently pays Ennis \$3.00 per 1,000 gallons with a \$6,750 monthly minimum payment. If Rice bought the maximum volume under the Ennis contract, it would pay an effective rate of \$5.50 per 1,000 gallons. That is substantially higher than Rice's effective rate with Corsicana of \$3.389 per 1,000 gallons.
39. If TRWD had been willing to sell them water in 1999, Rice, M.E.N., and Chatfield would have paid \$3.72 per 1,000 gallons.
40. Based on their average monthly consumption and taking into account all current rates, Rice pays Corsicana an average of \$3.389 per 1,000 gallons, M.E.N. pays \$3.296, and Chatfield pays \$3.33 under Corsicana current disputed rates, which is still significantly less than the \$3.72 per 1,000 gallons that they would have paid TRWD in 1999.
41. A comparison of what the Ratepayers pay Corsicana under the protested rates and what the Ratepayers pay or might have paid alternative suppliers does not indicate that Corsicana has abused its disparately greater bargaining power over the Ratepayers.

Existing Contracts Do Not Show Monopoly Abuse

42. Corsicana has entered into contracts with the Ratepayers for the capacity amounts that they sought and has not imposed a greater capacity commitment on them than they sought.
43. The term of each of the wholesale contracts is based on the wholesale customers' specific requests.
44. Except for Community's, each wholesale contract with Corsicana since the beginning has had a term of more than 20 years, which has enabled some Ratepayers to obtain financing for their systems, for example from Farmers Home Administration and USDA Rural Development.

45. Since most of Corsicana's debt is 20-year term, any contractual term beyond 20 years is solely for the benefit of the customer.
46. Since 2001, Corsicana has entered into a Standard Contract (with some modifications) with M.E.N., Angus, Chatfield, Corbet, Frost, Community, and Rice, but not with Blooming Grove, Kerens and Navarro Mills.
47. The mere use of a standard-contract form for similar customers does not demonstrate abuse or coercion by Corsicana.
48. The Standard Contract was prepared in mid-2001, and was intended for use by Corsicana when a wholesale customer requested to amend its contract.
49. The Ratepayers are member of the Texas Rural Water Association.
50. The Standard Contract was created as a joint effort by Corsicana's water-rights attorney and Rice's attorney, who was also General Counsel for the Texas Rural Water Association and generally represented the interest of its members.
51. At a June 26, 2001 meeting, the attorneys who prepared the proposed Standard Contract presented it to representatives of several of Corsicana's wholesale water customers. All of Corsicana's wholesale water customers were notified of and invited to that meeting. Among the attendants were M.E.N.'s General Manager, Dennis Donoho, and President, Paul Mitchell. There was an opportunity for the wholesale customers at that meeting to provide input into the Standard Contract.
52. The Standard Contract was not unilaterally imposed by Corsicana on its customers. Instead, it was a negotiated contract intended to balance the interests of Corsicana and its wholesale customers.

53. Each Standard Contract was altered to include the term of years and amount of water sought by each Ratepayer.
54. Section 4.03(d) of the Standard Contract contains the phrase “sole source,” but it expressly contemplates that the purchaser may obtain water from other sources while paying for and taking a minimum amount of water from Corsicana.
55. Rice’s ongoing purchases from Ennis, after entering into the Standard Contract with Corsicana in 2002, demonstrate that Section 4.03(d) of the Standard Contract is not a sole-source provision.
56. Section 4.03(d) of the Standard Contract is not a penalty provision. It is an alternative minimum payment provision that only applies if the purchaser obtains non-emergency water from another source.
57. Even if a Ratepayer chose to exercise its right under Section 4.03(d) of the Standard Contract to obtain water from another provider, Corsicana would remain obligated to make available to the purchaser the full amount of water specified by the Standard Contract and the Commission’s rules, unless waived, would require Corsicana to maintain the capacity necessary to meet that commitment.
58. Section 4.03(d) of the Standard Contract is a reasonable provision to limit Corsicana’s risk that the investment that it must make to serve the Ratepayers will be rendered worthless should the ratepayers switch to another supplier.
59. Section 4.03(d) of the Standard Contract reasonably balances between the parties to the contract the risk that a Ratepayer could choose to purchase water from a provider other than Corsicana.
60. Section 4.03(d) of the Standard Contract partially limits the Ratepayers’ access to alternative suppliers, but it is not abusive.

61. The differences between the prior contracts and the Standard Contract do not show that Corsicana has abused monopoly power. Many of the changes in the Standard Contract are either beneficial to the Ratepayers or equally beneficial to them and Corsicana.
62. Corsicana's use of the Standard Contract is not abusive.
63. The existing water supply contracts between Corsicana and the Ratepayers do not show that Corsicana has abused monopoly power.

Other Disparate Bargaining Power Factors

64. There is no significant evidence concerning the other disparate-bargaining-power factors listed in 30 TEX. ADMIN. CODE (TAC) § 291.133(a)(3)(A), environmental impact and regulatory issues.

Changed Conditions on Which the Rate Change Is Based

65. Corsicana's Utility Fund is a separate accounting for Corsicana's water and sewer service revenues and expenses.
66. At the time of the rate change, Corsicana's Utility Fund had a \$1 million shortfall.
67. Corsicana does not operate on credit; therefore, it must have a cash reserve available to cover potential shortfalls and emergencies.
68. The \$1 million deficit in Corsicana's Utility Fund, regardless of its cause or causes, was a changed condition that gave Corsicana a reasonable basis for increasing its water rates.

Revenue Requirement and Rate Computation Methodology Changes

69. The evidence does not show that Corsicana changed its revenue requirement computation methodology. Corsicana changed its methodology for designing its rates when it switched to inclining-block rates, but that change was not abusive.
70. There is no evidence that Corsicana has changed between the Cash and Utility Basis methods for computing its cost of service.
71. Since 2001, Corsicana has designed its rates to include a base rate and volumetric rates, which are the same for its wholesale customers as its inside-city retail customers.
72. Under the 2009 Rate Ordinance that adopted the protested rates, “Residential and Commercial (Inside City Limits)” customers are in “Class I.” The ordinance compares the previous rates and the new rates. For both it specifies that the base and volumetric rates for “Wholesale Contract Customers” are the “Same as Class I.”
73. Corsicana has numerous inside city retail customers who pay the same highest tier gallonage rates that the Ratepayers pay for wholesale service, and Corsicana’s inclining-block rates encourage water conservation.

Other Valuable Consideration Received Incident to the Contracts

74. The evidence does not show that other valuable consideration was received by either the Ratepayers or Corsicana incident to their water-supply contracts.

Incentives Necessary to Encourage Regional Projects or Water Conservation

75. The evidence does not indicate that the protested rates encourage regional projects.

76. Corsicana's inclining-block rates encourage water conservation consistent with TCEQ and Texas Water Development Board policy. That includes encouraging wholesale customers like the Ratepayers to search for and repair leaks.
77. Corsicana did not abuse monopoly power by adopting inclining-block rates.

Corsicana's Obligation to Meet Federal and State Drinking Water Standards

78. The relevant evidence does not show that the Corsicana's rate increase was attributable to Corsicana's obligation to meet federal and state drinking water standards.

Rates Charged in Texas by Other Sellers of Water for Resale

79. The City of Waxahachie's volumetric rate for wholesale customers is \$3.45 per 1,000 gallons, which is less than Corsicana's top-tier rate of \$3.25 per 1,000 gallons.
80. The Lake Granbury Surface Water and Treatment System, owned and operated by the Brazos River Authority, provides wholesale treated water only, at an average rate of \$3.97 per 1,000 gallons.
81. Rice's water supply contract with Ennis entitles Rice to purchase 2.7 MGM of water. Rice currently pays Ennis \$3.00 per 1,000 gallons with a \$6,750 monthly minimum payment. If Rice bought the maximum volume under the Ennis contract, it would pay an effective rate of \$5.50 per 1,000 gallons. That is substantially higher than Rice's effective rate with Corsicana of \$3.389 per 1,000 gallons.
82. The rates charged by other sellers of water for resale in Texas do not suggest that Corsicana's rates indicate an abuse of monopoly power.

Comparison of Corsicana's Retail Rates and Ratepayers' Retail Rates Due to Corsicana's Wholesale Rates

83. Corsicana's base rate is \$17.60 for a 5/8- or 3/4-inch meter with the first 1,000 gallons included. The volumetric rate is \$3.00 per 1,000 gallons for 1-10,000 gallons, \$3.15 per 1,000 gallons for 10,001-25,000 gallons, and \$3.25 per 1,000 gallons for over 25,000 gallons.
84. Nearly all of Corsicana's residential retail customers and many of its small commercial customers have 5/8- or 3/4-inch meters.
85. Both Corsicana's and the Ratepayers' average residential retail customer uses an average of 6,000 gallons per month.
86. Based on the above, an average in-city retail customer of Corsicana would be billed \$32.60 for water each month, which equates to an average of \$5.43 per 1,000 gallons for the 6,000 gallons that it uses.
87. The Ratepayers have larger meters than residential customers and pay a higher base rate, which includes the first 1,000 gallons, for each meter. Some of the Ratepayers have more than one meter.
88. Each Ratepayer is able to allocate to each of its retail customers a portion of the base rate that it pays to Corsicana, which provides a lower effective base rate per retail customer.
89. For the volumetric charge, the Ratepayers pay Corsicana's Third Tier rate on almost all of the water that they purchase from Corsicana; therefore, the volumetric rate averages \$3.25 per 1,000 gallons or \$19.50 for 6,000 gallons.
90. Taking into account both base and volumetric charges, the following table shows the average rate per 1,000 gallons that each Ratepayers' average retail customer pays due to Corsicana's wholesale rates:

Monthly Charges to Ratepayers' Average Residential Retail Customers Due To Corsicana's Wholesale Rates (per 1,000 gallons)					
[A]	[B]	[C]	[D] = [B] ÷ [C]	[E] = ([D] + (\$3.25 x 6))	[F] = [E] ÷ 6
Petitioner	Base Rate Charged by Corsicana	Number of Petitioner's Retail Connections	Petitioner's Retail Customer's Base Rate Attributable to Corsicana's Wholesale Rate	Monthly Water Rate as a Result of Corsicana's Wholesale Rate	Petitioner's Retail Customer's Rate per 1,000 gallons Resulting from Corsicana's Wholesale Rate
Angus	\$386.02	359	\$1.08	\$20.58	\$3.43
Blooming Grove	\$292.55	430	\$0.68	\$20.18	\$3.36
Chatfield	\$970.53	1,411	\$0.69	\$20.19	\$3.36
Community Water Co.	\$479.49	417	\$1.15	\$20.65	\$3.44
Corbet	\$467.94	820	\$0.57	\$20.07	\$3.35
Frost	\$292.55	247	\$1.18	\$20.68	\$3.45
Kerens	\$173.39	750	\$0.23	\$19.73	\$3.29
M.E.N.	\$497.31	1,412	\$0.35	\$19.85	\$3.31
Navarro Mills	\$584.51	1,210	\$0.48	\$19.98	\$3.33
Rice	\$2,747.89	3,156	\$0.87	\$20.37	\$3.40

91. Based on the above, an average residential retail customer pays a Ratepayer an average of \$3.45 or less per 1,000 gallons of water due to the wholesale rates that Corsicana charges the Ratepayer, while Corsicana's own average retail customer pays Corsicana an average of \$5.43 for 1,000 gallons.
92. Based on the above, a comparison of Corsicana's retail rates and Ratepayers' retail rates due to Corsicana's wholesale rates does not indicate that Corsicana is abusing monopoly power.

Transcription Cost

93. Because the hearing was scheduled for more than one day, the ALJ ordered the Ratepayers to arrange for and pay a court reporter to record and transcribe the hearing on

the merits and to deliver the original transcript to the ALJ and two copies to the TCEQ's Chief Clerk.

94. Because the ALJ ordered the transcript, no Party requested it.
95. The Ratepayers and Corsicana fully participated in the hearing and benefited from the transcript.
96. There is no evidence that justice requires a certain allocation of the transcription cost.
97. There is no evidence of budgetary constraints or whether the expense of this proceeding may be recovered through utility rates.
98. There is no specific evidence concerning the Ratepayers' or Corsicana's ability to pay for a transcript.
99. Corsicana, Blooming Grove, Frost, and Kerens are cities with tax bases; Community is an investor owned water utility; and the other Ratepayers are water supply corporations.
100. Corsicana and all of the Ratepayers are providing water service for compensation.
101. Ranked by connections served, Frost is the smallest Ratepayer and serves 247 connections. Rice is the largest and serves 3,156 connections.
102. Corsicana and the Ratepayers were all represented by competent and experienced counsel throughout the long prehearing and 5-day hearing process.
103. Based on the above, Corsicana and each of the Ratepayers can pay 1/11th of the cost of the transcript and copies for the ALJ and TCEQ.

II. CONCLUSIONS OF LAW

Jurisdiction

1. As required by TEX. GOV'T CODE ANN. (Gov't Code) §§ 2001.051(1) and 2001.052, the Parties were notified of the hearing.
2. The Commission has jurisdiction under Water Code §§ 11.036 and 11.041 to consider the Second Amended Petition by each of the Ratepayers.
3. Additionally, the Commission has jurisdiction under Water Code § 12.013 to consider the Second Amended Petition by Blooming Grove, Frost and Kerens because each of them is a political subdivision.
4. As general principal of law associational standing is not appropriate when the participation of a party is required. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).
5. The Commission's wholesale-service rules, Subchapter I of Chapter 291 of 30 TAC, are applicable in this case because the petitions seek review of rates charged for the sale of water for resale and were filed pursuant to Water Code Chapters 11 and 12 and Section 13.043(f).
6. Several of the factors that the Commission considers in determining whether the protested rate affects the public interest focus on the unique circumstances of an individual ratepayer and its relationship with the wholesale provider. 30 TAC § 291.133(a)(2), (3)(A) & (D) & (4).
7. The participation of the individual who receives water service is required in a wholesale-rate appeal.

8. Based on the above Findings of Fact and Conclusions of Law, NCWR did not have standing to file the Original Petition as an association of the Ratepayers.
9. The Commission has no jurisdiction under Water Code § 13.043(f) to consider the Original Petition because it was not filed by a retail public utility that received water service from Corsicana.
10. The Commission has no jurisdiction under Water Code § 13.043(f) to consider the First or Second Amended Petitions because they were not filed within 90 days after receiving notice of Corsicana's rate increase.
11. Based on the above Findings of Fact and Conclusions of Law, the Commission has no jurisdiction to consider NCWR's petitions on its own behalf and they should be denied with prejudice to refiling.
12. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Gov't Code ch. 2003.

The Requirement for an Initial Public-interest Determination

13. Unless the parties agree otherwise, the wholesale-service rules require an initial hearing to determine whether a protested rate charged pursuant to a contract adversely affects the public interest. 30 TAC §§ 291.131(b) and 291.132(a), (c), and (d).
14. In the public-interest hearing, the petitioner has the burden of proof. 30 TAC § 291.136.
15. If the Commission determines the protested rate does not adversely affect the public interest, the Commission will deny the petition or appeal by final order. 30 TAC § 291.134(a).

Public Interest Factors

16. Commission rule 30 TAC § 291.133(a) sets out the factors to be considered in determining whether the public interest is affected by a protested wholesale rate.
17. The public-interest inquiry is limited to the factors set out in 30 TAC § 291.133(a)(1)-(4), and it does not include a comparison of protested rate's impacts on wholesale and retail customers.
18. The Commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service. 30 TAC § 291.133(b)
19. Whether the protested rate conforms to the contracts between the Ratepayers and Corsicana is outside the scope of this case. The Commission assumes that the seller's protested rate correctly interprets any existing agreement between the seller and purchaser. The Commission decision is not tantamount to a judicial interpretation of any underlying agreement. The parties would still have the courts to seek this redress.

Public-interest Considerations in This Case

20. The Ratepayers have not claimed that the factors set out in 30 TAC § 291.133(a)(1), (2) & (4) are applicable in this case.
21. Under 30 TAC § 291.133(a)(3), the Commission shall determine the protested rate adversely affects the public interest if after the evidentiary hearing on public interest the Commission concludes the protested rate evidences the seller's abuse of monopoly power in its provision of water service to the purchaser. In making this inquiry, the Commission shall weigh all relevant factors. The factors may include:
 - (a) the disparate bargaining power of the parties, including the purchaser's alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water service;

(b) the seller's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates;

(c) the seller changed the computation of the revenue requirement or rate from one methodology to another;

(d) where the seller demands the protested rate pursuant to a contract, other valuable consideration received by a party incident to the contract;

(e) incentives necessary to encourage regional projects or water conservation measures;

(f) the seller's obligation to meet federal and state drinking water standards;

(g) the rates charged in Texas by other sellers of water service for resale; and

(h) the seller's rates for water service charged to its retail customers, compared to the retail rates the purchaser charges its retail customers as a result of the wholesale rate the seller demands from the purchaser.

22. The Ratepayers have failed to show under the factors set out in 30 TAC § 291.133(a)(3) that Corsicana's protested rates evidence Corsicana's abuse of monopoly power in its provision of water service to them.

23. The Ratepayers have failed to show that any public interest criteria set out in 30 TAC § 291.133(a) has been violated by Corsicana or its protested rates.

24. In accordance with 30 TAC § 291.134(a), the Ratepayers' petitions for review of Corsicana wholesale rates should be denied.

Transcriptions Costs

25. Commission rule 30 TAC § 80.23(d) provides that the Commission will not assess transcript costs against the ED or the OPIC and that it will consider the following relevant factors in allocating reporting and transcription costs among the other parties:

- the party who requested the transcript;
- the financial ability of the party to pay the costs;

- the extent to which the party participated in the hearing;
- the relative benefits to the various parties of having a transcript;
- the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- any other factor which is relevant to a just and reasonable assessment of costs.

26. Based on the above Findings of Fact and Conclusions of Law, Corsicana and each of the Ratepayers should be required to pay 1/11th of the cost of the transcript and copies for the ALJ and TCEQ.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The petitions of NCWR, M.E.N. Water Supply Corporation, Rice Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, Navarro Mills Water Supply Corporation, City of Blooming Grove, City of Frost, City of Kerens, and Community Water Company to review the wholesale rate increase imposed by the City of Corsicana under Certificate of Convenience and Necessity No. 10776 in Navarro County are denied with prejudice to refiling.
2. In accordance with 30 TAC § 80.23, each of the following parties shall pay 1/11th of the cost of the transcript and copies for the ALJ and Commission: M.E.N. Water Supply Corporation, Rice Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, Navarro Mills Water Supply Corporation, City of Blooming Grove, City of Frost, City of Kerens, Community Water Company, and the City of Corsicana

3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
5. The Commission's Chief Clerk shall forward a copy of this Order to the Parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission